Antitrust: Commission seeks feedback on commitments offered by Amazon concerning marketplace seller data and access to Buy Box and Prime

Brussels, 14 July 2022

The European Commission invites comments on commitments offered by Amazon to address competition concerns over its use of non-public marketplace seller data and over a possible bias in granting sellers access to its Buy Box and its Prime programme.

The Commission's investigations

Amazon is a data-driven company whose retail decisions are for most driven by automated systems, fuelled by the relevant data. Amazon has a dual role as a platform. It runs a marketplace where independent sellers can sell products directly to consumers and at the same time, it sells products on its platform as a retailer, in competition with independent sellers. As a result of this dual position, Amazon, has access to large sets of data about the independent sellers' activities on its platform, including non-public business data.

On 17 July 2019, the Commission opened a formal investigation to assess whether Amazon's **use of non-public data** from independent retailers selling in its marketplace breached EU competition rules. On 10 November 2020, the Commission issued a Statement of Objections outlining its preliminary view that Amazon should not rely on independent sellers' business data to calibrate its retail decisions, as this distorts fair competition on its platform and prevents effective competition.

In parallel, the Commission opened a second investigation into:

i. Amazon's **Buy Box**, which prominently displays the offer of one single seller and allows products to be swiftly purchased by directly clicking on a buy button, and;

ii. Amazon's **Prime programme**, which offers premium services to customers for a monthly or yearly fee and allows independent sellers to sell to Prime customers under certain conditions.

The Commission preliminarily found that the rules and criteria for the Buy Box and Prime unduly favour Amazon's own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services. This bias may harm other marketplace sellers, their independent carriers, other marketplaces, as well as consumers that may not get to view the best deals.

The offered commitments

To address the Commission's competition concerns in relation to both investigations, Amazon has offered the following commitments:

- **With respect to the marketplace seller data,** Amazon commits to refrain from using non-public data relating to, or derived from, the activities of independent sellers on its marketplace, for its retail business that competes with those sellers. This would apply to both Amazon's automated tools and employees that could cross-use the data from Amazon Marketplace, for the purposes of retail decisions. The relevant data would cover both individual and aggregate data, such as sales terms, revenues, shipments, inventory related information, consumer visit data or seller performance on the platform. Amazon commits not to use such data for the purposes of selling branded goods as well as its private label products.
- **In relation to the Buy Box** Amazon commits:
  - to apply equal treatment to all sellers when ranking their offers for the purposes of the selection of the winner of the Buy Box;
  - and in addition, to display a second competing offer to the Buy Box winner if there is a second offer that is sufficiently differentiated from the first one on price and/or delivery. Both offers will display the same descriptive information and provide for the same purchasing experience. This will enhance consumer choice.
- **Lastly, regarding Prime** Amazon commits:

- to set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime;
- to allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate terms directly with the carrier of their choice;
- not to use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services. This is to ensure that carriers' data is not flowing directly to Amazon's competing logistics services.

The offered commitments cover all Amazon's current and future marketplaces in the European Economic Area. They exclude Italy for the commitments related to Buy Box and Prime in view of the decision of 30 November 2021 of the Italian competition authority which already imposed remedies on Amazon with regard to the Italian market.

The commitments would remain in force for five years. Their implementation would be monitored by a monitoring trustee who would report regularly to the Commission.

The Commission invites all interested parties to submit their views on Amazon's proposed commitments before 9 September 2022.

A summary of the proposed commitments will be published in the EU's Official Journal. The full text of the commitments will be available on DG Competition's website.

Background

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant market position, including the imposition of unfair pricing in the form of excessive prices. The implementation of these provisions is defined in the EU's Antitrust Regulation, (Council Regulation (No) 1/2003), which is also applied by national competition authorities.

Article 9(1) of the Regulation (No) 1/2003 enables companies investigated by the Commission to offer commitments in order to meet the Commission's concerns and empowers the Commission to make such commitments binding on the companies. Article 27(4) of Regulation (No) 1/2003 requires that before adopting a decision pursuant to Article 9 of Regulation (No) 1/2003, the Commission shall provide interested third parties with an opportunity to comment on the offered commitments.

If the market test indicates that the commitments address the competition concerns, the Commission may adopt a decision making them legally binding Amazon. Such a decision would not conclude that there is an infringement of EU antitrust rules, but would legally bind Amazon to respect the commitments it has offered.

If Amazon breaks such commitments, the Commission can impose a fine of up to 10% of the company's worldwide turnover, without having to prove an infringement of the EU antitrust rules.

More information on the investigations is available on the Commission's competition website in the public case register under the case numbers AT.40462 and AT.40703.

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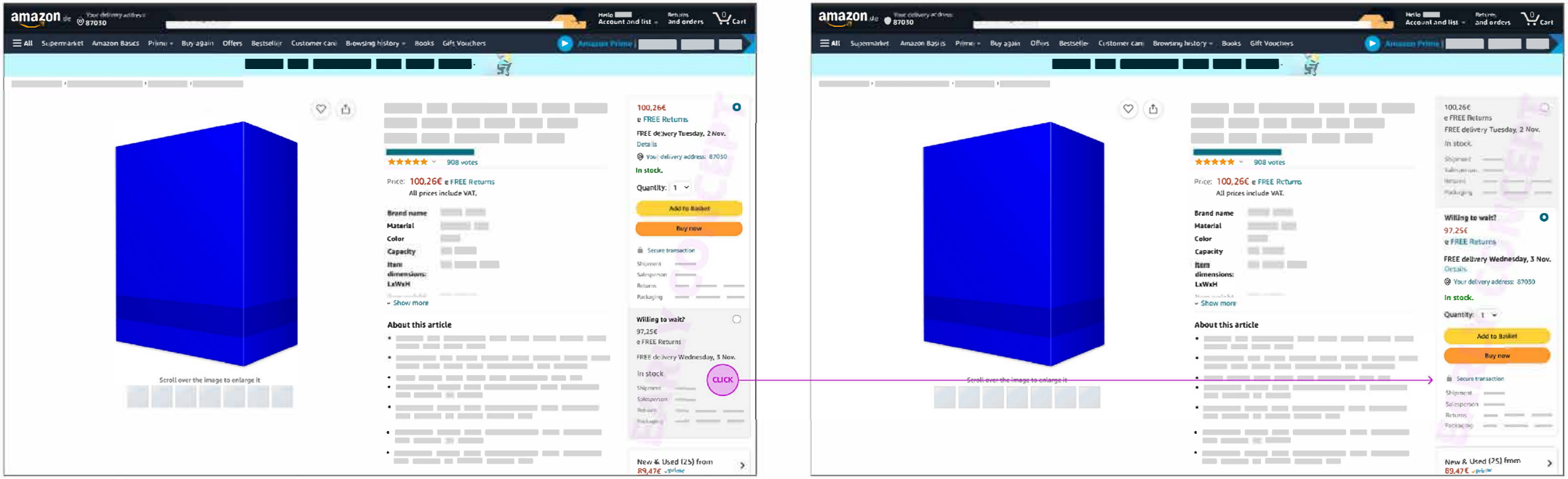
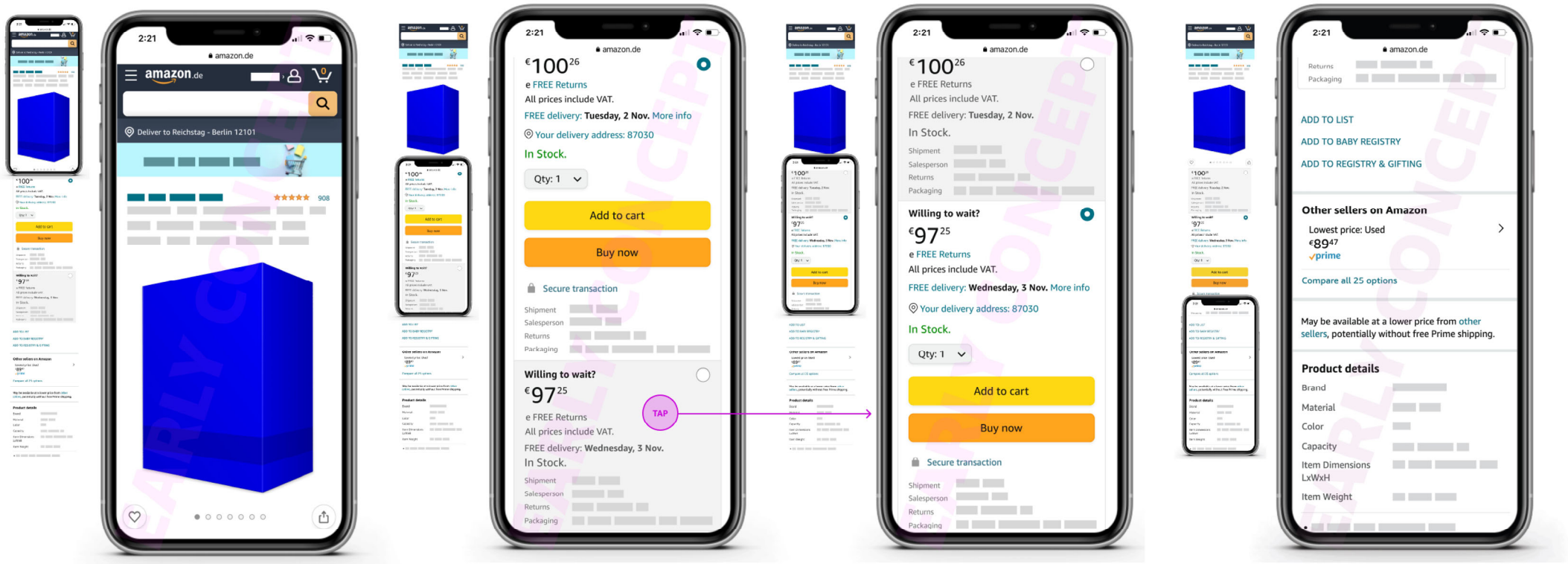
The display of a second Offer in the Offer Display

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Product details
Brand
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Item Dimensions LxWxH
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Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime

Brussels, 20 December 2022

The European Commission has made commitments offered by Amazon legally binding under EU antitrust rules. Amazon's commitments address the Commission's competition concerns over Amazon's **use of non-public marketplace seller data** and over a possible bias in granting to sellers access to its **Buy Box** and its **Prime programme**.

The Commission's concerns

In July 2019, the Commission opened a formal investigation into Amazon's **use of non-public data** of its marketplace sellers. On 10 November 2020, the Commission adopted a Statement of Objections in which it preliminarily found Amazon dominant on the French and German markets, for the provision of online marketplace services to third-party sellers. It also found that that Amazon's reliance on marketplace sellers' non-public business data to calibrate its retail decisions, distorted fair competition on its platform and prevented effective competition.

In parallel, on 10 November 2020, the Commission opened a second investigation to assess whether the criteria that Amazon sets to select the winner of the **Buy Box** and to enable sellers to offer products under its **Prime Programme**, lead to preferential treatment of Amazon's retail business or of the sellers that use Amazon's logistics and delivery services.

In the second investigation, the Commission preliminarily concluded that Amazon abused its dominance on the French, German and Spanish markets for the provision of online marketplace services to third-party sellers.

It also preliminarily concluded that Amazon's rules and criteria for the Buy Box and Prime unduly favour its own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services.

The commitments

To address the Commission's competition concerns in relation to both investigations, Amazon initially offered the following commitments:

- To address the data use concern, Amazon proposed to commit:

- not to use non-public data relating to, or derived from, the independent sellers' activities on its marketplace, for its retail business. This applies to both Amazon's automated tools and employees that could cross-use the data from Amazon Marketplace, for retail decisions;
- not to use such data for the purposes of selling branded goods as well as its private label products.

- To address the Buy Box concern, Amazon proposed to commit to:

- treat all sellers equally when ranking the offers for the purposes of the selection of the Buy Box winner;
- display a second competing offer to the Buy Box winner if there is a second offer from a different seller that is sufficiently differentiated from the first one on price and/or delivery. Both offers will display the same descriptive information and provide the same purchasing experience.

- To address the Prime concerns Amazon proposed to commit to:

- set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime;
- allow Prime sellers to freely choose any carrier for their logistics and delivery services and

negotiate terms directly with the carrier of their choice;

- not use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services.

Between 14 July 2022 and 9 September 2022, the Commission market tested Amazon's commitments and consulted all interested third parties to verify whether they would remove its competition concerns. In light of the outcome of this market test, Amazon amended the initial proposal and committed to:

- **Improve** the **presentation** of the **second competing Buy Box offer** by making it more prominent and to include a **review mechanism** in case the presentation is not attracting adequate consumer attention;
- **Increase** the **transparency** and **early information flows** to sellers and carriers about the commitments and their newly acquired rights, enabling, amongst others, early switching of sellers to independent carriers;
- Lay out the means for **independent carriers to directly contact their Amazon customers**, in line with data-protection rules, enabling them to provide equivalent delivery services to those offered by Amazon;
- **Improve carrier data protection** from use by Amazon's competing logistics services, in particular concerning cargo profile information;
- **Increase** the **powers** of the **monitoring trustee** by introducing further notification obligations;
- Introduce a **centralised complaint mechanism**, open to all sellers and carriers in case of suspected non-compliance with the commitments.
- **Increase** to **seven years**, instead of the initially proposed five years, the **duration** of the **commitments relating to Prime and the second competing Buy Box offer**.

The Commission found that Amazon's final commitments will ensure that Amazon does not use marketplace seller data for its own retail operations and that it grants non-discriminatory access to Buy Box and Prime. The Commission decided to make them legally binding on Amazon.

The offered commitments cover all Amazon's current and future marketplaces in the European Economic Area. They exclude Italy for the commitments relating to the Buy Box and Prime in view of the decision of 30 November 2021 of the Italian competition authority imposing remedies on Amazon with regard to the Italian market.

The final commitments will remain in force for seven years in relation to Prime and the display of the second competing Buy Box offer, and five years for the remaining parts of the commitments. Under supervision of the Commission, an independent trustee will be in charge of monitoring the implementation and compliance with the commitments.

If Amazon were to breach the commitments, the Commission could impose a fine of up to 10% of Amazon's total annual turnover, without having to find an infringement of EU antitrust rules or a periodic penalty payment of 5% per day of Amazon's daily turnover for every day of non-compliance.

Background

Amazon has a dual role as a platform. It runs a marketplace where independent sellers can sell products directly to consumers and at the same time, it sells products on its platform as a retailer, in competition with those independent sellers. As a result of this dual position, Amazon, has access to large data sets about the independent sellers' activities on its platform, including non-public business data.

Amazon's **Buy Box**, prominently displays the offer of one single seller and allows products to be swiftly purchased by directly clicking on a buy button. Amazon's **Prime programme**, offers premium services to customers for a fee and allows independent sellers to sell to Prime customers under certain conditions.

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position that may affect trade within the EU and prevent or restrict competition. The implementation of this provision is defined in the EU Antitrust Regulation (Regulation No 1/2003), which can also be applied by the national competition authorities.

Article 9 (1) of the EU Antitrust Regulation (Regulation 1/2003) allows the Commission to conclude antitrust proceedings by accepting commitments offered by a company. Such a decision does not reach a conclusion as to whether there is an infringement of EU antitrust rules but legally binds the company to respect the commitments. A policy brief on commitment decisions under Article 9 is available here.

More information, including the full text of today's Article 9 Commission decision and the full version of the commitments will be available on the Commission's competition website in the public case register under the case numbers AT.40462 and AT.40703.

IP/22/7777

Quotes:

Today's decision sets new rules for how Amazon operates its business in Europe. Amazon can no longer abuse its dual role and will have to change several business practices. They cover the use of data, the selection of sellers in the Buy Box and the conditions of access to the Amazon Prime Programme. Competing independent retailers and carriers as well as consumers will benefit from these changes opening up new opportunities and choice.
Margrethe Vestager, Executive Vice-President in charge of competition policy - 20/12/2022

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FEDERAL TRADE COMMISSION,

STATE OF NEW YORK,

STATE OF CONNECTICUT,

COMMONWEALTH OF PENNSYLVANIA,

STATE OF DELAWARE,

STATE OF MAINE,

STATE OF MARYLAND,

COMMONWEALTH OF MASSACHUSETTS,

STATE OF MICHIGAN,

STATE OF MINNESOTA,

STATE OF NEVADA,

STATE OF NEW HAMPSHIRE,

STATE OF NEW JERSEY,

STATE OF NEW MEXICO,

STATE OF OKLAHOMA,

STATE OF OREGON,

CASE NO.: 2:23-cv-01495-JHC

COMPLAINT
[PUBLIC REDACTED VERSION]

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2222

STATE OF RHODE ISLAND,

and

STATE OF WISCONSIN,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

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Plaintiffs Federal Trade Commission ("FTC") and the states of New York, Connecticut, Pennsylvania, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, and Wisconsin, by and through their respective Attorneys General (together, the "State Plaintiffs," and collectively with the FTC, "Plaintiffs"), petition this Court pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b); 15 U.S.C. § 26; and applicable state laws for equitable relief against Defendant Amazon.com, Inc. ("Amazon") to undo and prevent its unfair methods of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); Section 2 of the Sherman Act, 15 U.S.C. § 2; and state competition and consumer protection laws.

I. NATURE OF THE CASE

1. The early days of online trade were bursting with possibility. Competition flourished. A newly connected nation saw a wide-open frontier where anyone with a good idea would have a fair shot at success.

2. Today, however, this wide-open frontier has been enclosed. A single company, Amazon, has seized control over much of the online retail economy.

3. Amazon is a monopolist. It exploits its monopolies in ways that enrich Amazon but harm its customers: both the tens of millions of American households who regularly shop on Amazon's online superstore and the hundreds of thousands of businesses who rely on Amazon to reach them.

4. For example, Amazon has hiked so steeply the fees it charges sellers that it now reportedly takes close to *half* of every dollar from the typical seller that uses Amazon's fulfillment service. Amazon recognizes that sellers find "that it has become more difficult over time to be profitable on Amazon" due to Amazon's "increasing fees and costs." But as one seller explains, "we have nowhere else to go and Amazon knows it." Amazon has also quietly and

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deliberately raised prices for shoppers through a covert operation called "Project Nessie." Explicitly intended to inflate the prices that shoppers pay, Amazon's Project Nessie has already extracted over a billion dollars from American households.

5. In addition to overcharging its customers, Amazon is degrading the services it provides them. Amazon's online storefront once prioritized relevant, organic search results. Following directions from its founder and then-CEO Jeff Bezos, Amazon shifted gears so that it now litters its storefront with pay-to-play advertisements. Amazon executives internally acknowledge this creates "harm to consumers" by making it "almost impossible for high quality, helpful organic content to win over barely relevant sponsored content." This practice, too, harms both sellers and shoppers alike. Most sellers must now pay for advertising to reach Amazon's massive base of online shoppers, while shoppers consequently face less relevant search results and are steered toward more expensive products. Notably, Amazon has increased not only the number of advertisements it shows, but also the number of irrelevant junk ads, internally called "defects." Mr. Bezos instructed his executives to "[a]ccept more defects" because Amazon can extract billions of dollars through increased advertising despite worsening its services for customers.

6. In a competitive world, Amazon's decision to raise prices and degrade services would create an opening for rivals and potential rivals to attract business, gain momentum, and grow. But Amazon has engaged in an unlawful monopolistic strategy to close off that possibility.

7. This case is about the illegal course of exclusionary conduct Amazon deploys to block competition, stunt rivals' growth, and cement its dominance. The elements of this strategy are mutually reinforcing. Amazon uses a set of anti-discounting tactics to prevent rivals from growing by offering lower prices, and it uses coercive tactics involving its order fulfillment

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service to prevent rivals from gaining the scale they need to meaningfully compete. Amazon deploys this interconnected strategy to block off every major avenue of competition—including price, product selection, quality, and innovation—in the relevant markets for online superstores and online marketplace services.

8. Amazon's course of conduct has unlawfully entrenched its monopoly position in both relevant markets. According to an industry source, Amazon now captures more sales than the next fifteen largest U.S. online retail firms combined. Yet Amazon has violated the law not by being big, but by how it uses its scale and scope to stifle competition.

9. A critical mass of customers is key to powering what Amazon calls its "flywheel." By providing sellers access to significant shopper traffic, Amazon is able to attract more sellers onto its platform. Those sellers' selection and variety of products, in turn, attract additional shoppers. More shoppers yield more customer-generated product ratings, reviews, and valuable consumer data for Amazon to use. All of this enables Amazon to benefit from the accelerated growth and momentum that network effects and scale economies can fuel.

10. The biggest threat to Amazon's monopoly power would be for a rival to attract its own critical mass of dedicated customers. Competitors able to build a sizable base of either shoppers or sellers could spin up their own "flywheels," overcome barriers to entry and expansion, and achieve the scale needed to compete effectively in the relevant markets. As Mr. Bezos once wrote, "[o]nline selling (relative to traditional retailing) is a scale business characterized by high fixed costs and relatively low variable costs. This makes it difficult to be a medium-sized e-commerce company," and it is "difficult . . . for single-category e-commerce companies to achieve the scale necessary to succeed." In order to "build an important and lasting company . . . online in e-commerce," Mr. Bezos explained, "you have to have a scale business," because "[t]his kind of business isn't going to work in small volumes."

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11. Having gained its own critical mass of both shoppers and sellers, Amazon set out to deny both current and would-be rivals the ability to do the same.

12. Amazon uses its vast power, size, and control over multiple business units to implement an interrelated and exclusionary course of conduct. Each element of this overarching strategy aims at the same goal: to keep rivals from gaining the scale needed to compete effectively against Amazon. And each element amplifies the force of the rest, in a self-reinforcing cycle of dominance and harm.

13. One set of tactics stifles the ability of rivals to attract shoppers by offering lower prices. Amazon deploys a sophisticated surveillance network of web crawlers that constantly monitor the internet, searching for discounts that might threaten Amazon's empire. When Amazon detects elsewhere online a product that is cheaper than a seller's offer for the same product on Amazon, Amazon punishes that seller. It does so to prevent rivals from gaining business by offering shoppers or sellers lower prices.

14. Originally, Amazon imposed explicit contractual requirements barring all sellers from offering their goods for lower prices anywhere else. After European regulators began investigating, Amazon got rid of these requirements in Europe. After a U.S. senator called for antitrust scrutiny, Amazon did the same in the United States in 2019.

15. Amazon recognized that dropping an explicit contractual requirement while continuing to use other anti-discounting tactics would appear "not only trivial but a trick and an attempt to garner goodwill with policymakers amid increasing competition concerns."

16. But Amazon has done just that. It continues to use—and add—other anti-discounting tactics to discipline sellers who offer lower-priced goods elsewhere. The sanctions Amazon levies on sellers vary. For example, Amazon knocks these sellers out of the all-important "Buy Box," the display from which a shopper can "Add to Cart" or "Buy Now" an

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Amazon-selected offer for a product. Nearly 98% of Amazon sales are made through the Buy Box and, as Amazon internally recognizes, eliminating a seller from the Buy Box causes that seller's sales to "tank." Another form of punishment is to bury discounting sellers so far down in Amazon's search results that they become effectively invisible. Still another is to erase a product's price from public view, even if the offer is the best deal available on Amazon. For especially important sellers, Amazon keeps in place a targeted version of the contractual requirement it supposedly stopped using in 2019. If caught offering lower prices elsewhere online, these sellers face the ultimate threat: not just banishment from the Buy Box, but total exile from Amazon's Marketplace. As Amazon internally admits, these tactics have a "punitive aspect," and many sellers "live in constant fear" of them.

17. Moreover, Amazon's one-two punch of seller punishments and high seller fees often forces sellers to use their inflated Amazon prices as a price floor everywhere else. As a result, Amazon's conduct causes online shoppers to face artificially higher prices even when shopping somewhere other than Amazon. Amazon's punitive regime distorts basic market signals: one of the ways sellers respond to Amazon's fee hikes is by increasing their own prices off Amazon. An executive from another online retailer sums up this perverse dynamic: Amazon's anti-discounting conduct "forc[es sellers] to raise prices on other platforms where their cost base is potentially lower." Amazon's illegal tactics mean that when Amazon raises its fees, others—competitors, sellers, and shoppers—suffer the harms.

18. Amazon's tactics suppress rival online superstores' ability to compete for shoppers by offering lower prices, thereby depriving American households of more affordable options. Amazon's conduct also suppresses rival online marketplace service providers' ability to compete for sellers by offering lower fees because sellers cannot pass along those savings to shoppers in the form of lower product prices.

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19. These various anti-discounting tactics constrain sellers operating on Amazon's third-party business unit, through which sellers set their own product prices. But Amazon also operates an enormous first-party arm, which accounted for 40% of its overall unit sales in the second quarter of 2023, as shown in Figure 1. Using its direct control over these prices, Amazon created another anti-discounting tool to weaponize its first-party arm in its campaign against competition.

Figure 1. Source: Amazon Q2 2023 Earnings Call.

20. Amazon has implemented an algorithm for the express purpose of deterring other online stores from offering lower prices. This algorithm was conceived by Amazon's former CEO of its Worldwide Consumer business, Jeff Wilke. According to Mr. Wilke, Amazon deploys this algorithm to avoid a "perfectly competitive market" in which participants lower their prices to a competitive level. Rather than trying to compete, Amazon uses a "game theory approach," never making the first move and instead disciplining rivals by rapidly copying others' moves to the penny, both up and down. The goal is to ensure that rivals' price cuts and discounts do not translate to greater scale, only lower margins. Ultimately, this conduct is meant to deter rivals from attempting to compete on price altogether—competition that could bring lower prices to tens of millions of American households. As a result of this conduct, Amazon predicted, "prices will go up." Mr. Wilke believes that Amazon's prediction has borne out and the

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algorithm has worked just as he envisioned: suppressing price competition by disciplining rival retailers who dare to discount.

21. Amazon's various anti-discounting tactics upend the normal give-and-take process of competition. Even rivals that offer lower-cost marketplace services struggle to attract sellers and watch as sellers hike prices on their storefronts due to fear of Amazon's penalties. Many sellers raise their prices off Amazon to avoid punishment. Others never try discounting in the first place; fear of retribution by Amazon drives them to preemptively set higher prices everywhere. Still others simply stop—or never start—selling anywhere other than Amazon to avoid any possibility of Amazon's sanctions.

22. By taming price cutters into price followers, Amazon freezes price competition and deprives American shoppers of lower prices.

23. Alongside these anti-discounting tactics, Amazon also goes a step further and hikes prices directly and outright. Amazon created a secret algorithm internally codenamed "Project Nessie" to identify specific products for which it predicts other online stores will follow Amazon's price increases. When activated, this algorithm raises prices for those products and, when other stores follow suit, keeps the now-higher price in place. Amazon has deemed Project Nessie "an incredible success": it has generated more than $1 billion in excess profit for Amazon. Aware of the public fallout it risks, Amazon has turned Project Nessie off during periods of heightened outside scrutiny and then back on when it thinks that no one is watching.

24. Amazon deploys yet another tactic as part of its monopolistic course of conduct. Amazon conditions sellers' ability to be "Prime eligible" on their use of Amazon's order fulfillment service. As with Amazon's anti-discounting tactics, this coercive conduct forecloses Amazon's rivals from drawing a critical mass of sellers or shoppers—thereby depriving them of the scale needed to compete effectively online.

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25. Amazon makes Prime eligibility critical for sellers to fully reach Amazon's enormous base of shoppers. In 2021, more than [redacted]% of all units sold on Amazon in the United States were Prime eligible.

26. Prime eligibility is critical for sellers in part because of the enormous reach of Amazon's Prime subscription program. According to public reports, Mr. Bezos told Amazon executives that Prime was created in 2005 to "draw a moat around [Amazon's] best customers." Prime now blankets more than [redacted]% of all U.S. households, with its reach extending as far as [redacted]% in some zip codes.

27. Amazon requires sellers who want their products to be Prime eligible to use Amazon's fulfillment service, Fulfillment by Amazon ("FBA"), even though many sellers would rather use an alternative fulfillment method to store and package customer orders.

28. Many sellers would also prefer to "multihome," simultaneously offering their goods across multiple online sales channels. Multihoming can be an especially critical mechanism of competition in online markets, enabling rivals to overcome the barriers to entry and expansion that scale economies and network effects can create. Multihoming is one way that sellers can reduce their dependence on a single sales channel.

29. Sellers could multihome more cheaply and easily by using an independent fulfillment provider—a provider not tied to any one marketplace—to fulfill orders across multiple marketplaces. Permitting independent fulfillment providers to compete for any order—on or off Amazon—would enable them to gain scale and lower their costs to sellers. That, in turn, would make independent providers even more attractive to sellers seeking a single, universal provider. All of this would make it easier for sellers to offer items across a variety of outlets, fostering competition and reducing sellers' dependence on Amazon.

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30. But by coercively conditioning access to an enormous base of shoppers on sellers' use of FBA, Amazon forecloses that world.

31. Amazon caught a glimpse of this alternative universe when it temporarily relaxed its coercive conduct. As Amazon recognized, this decision was immediately popular with both shoppers and sellers. But internally, Amazon soon realized that its move could enable greater multihoming, facilitating competition that would threaten Amazon's monopoly power. An Amazon executive explained to his colleagues that he had an "'oh crap' moment" when he realized that this was "fundamentally weakening [Amazon's] competitive advantage in the U.S. . . . as sellers are now incented to run their own warehouses and enable other marketplaces with inventory that in FBA would only be available to our customers."

32. To combat this competitive threat, Amazon resumed its coercive fulfillment conduct: today, virtually all sellers must use Amazon's proprietary FBA service to fully reach Amazon's enormous base of U.S. shoppers.

33. Each element of Amazon's monopolistic strategy works to keep its rivals and potential rivals from growing, gaining momentum, and achieving the scale necessary to meaningfully compete against Amazon. The cumulative impact of Amazon's unlawful conduct is greater than the harm caused by any particular element. Each aspect of Amazon's strategy amplifies the exclusionary effects of the others, further insulating Amazon from meaningful competition and further widening the gulf between Amazon and everyone else.

34. Together, this self-reinforcing course of conduct blocks every important avenue of competition. With its monopoly power cemented, Amazon is now extracting monopoly profits without denting—and instead while growing—its monopoly power. Amazon has consistently hiked the prices it charges sellers, as shown in Figure 2.

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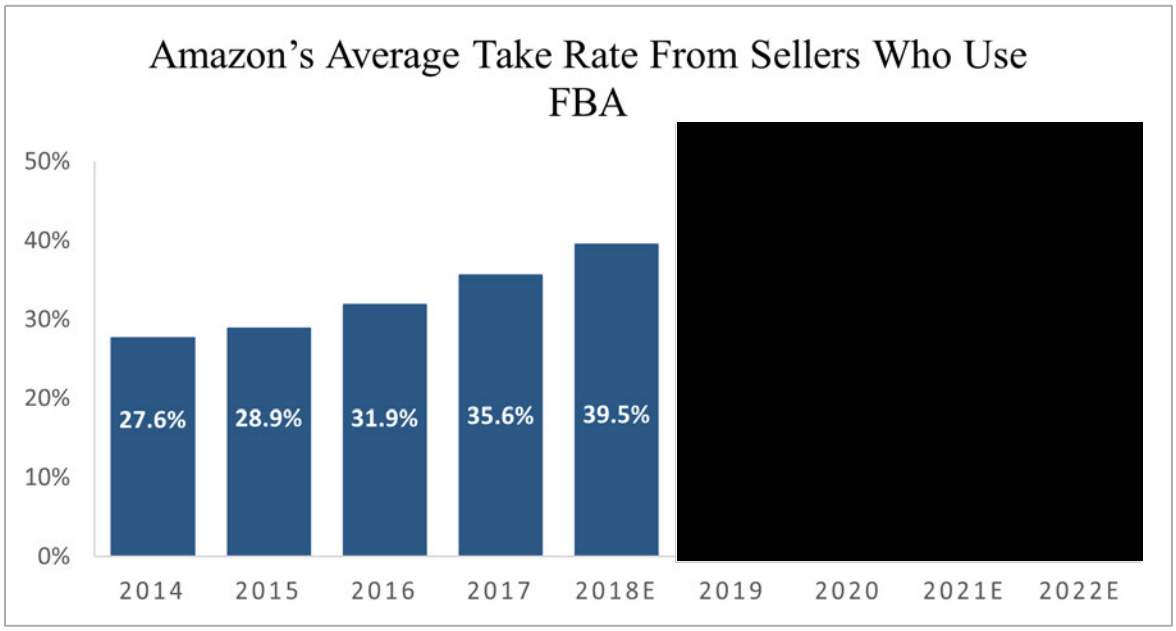

Figure 2. Source: Amazon Internal Documents.

35. Amazon's price hikes in the form of pay-to-play advertisements have been enormously lucrative, leading its revenues from U.S. ad sales to skyrocket from $1 billion in 2015 to [redacted] billion in 2021. Amazon took in [redacted] billion in revenue from U.S. Marketplace seller fees in 2021 alone. Strikingly, these seller fees now account for *over* [redacted]% of Amazon's total profits. Sellers pay. Shoppers get lower-quality search results for higher-priced products. Only Amazon wins.

36. In a market free from anticompetitive restraints, Amazon's choice to exploit its monopoly power would create openings for rivals to enter, grow, and meaningfully compete. Rival online marketplaces could draw sellers by offering them lower fees or better terms, and sellers could pass along those lower costs to American shoppers in the form of lower prices. Rival online superstores, meanwhile, could draw shoppers by offering better prices, greater selection, or a superior shopping experience. But Amazon's illegal course of conduct shields Amazon from the competitive checks it would face in a free enterprise system.

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37. Amazon's illegal monopolistic strategy is paying off for Amazon, but at great cost to tens of millions of American households and hundreds of thousands of sellers.

38. Left unchecked, Amazon will continue its illegal course of conduct to maintain its monopoly power. That conduct will include—but will not necessarily be limited to—the schemes it uses today. As Mr. Bezos has said, "on matters of vision we are stubborn and relentless," but "[o]n the details, we at Amazon are always flexible."

39. Plaintiffs bring this lawsuit despite Amazon's extensive efforts to impede the government's investigation and hide information about its internal operations. Amazon executives systematically and intentionally deleted internal communications using the "disappearing message" feature of the Signal messaging app. Amazon prejudicially destroyed more than two years' worth of such communications—from June 2019 to at least early 2022—despite Plaintiffs' instructing Amazon not to do so.

40. Plaintiffs now ask this Court to put an end to Amazon's illegal course of conduct, pry loose Amazon's monopolistic control, deny Amazon the fruits of its unlawful practices, and restore the lost promise of competition.

II. JURISDICTION AND VENUE

41. This Court has subject matter jurisdiction over this action pursuant to Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), 15 U.S.C. § 26, 28 U.S.C. §§ 1331, 1337(a), and 1345, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). This Court's exercise of supplemental jurisdiction over State Plaintiffs' state law claims will avoid unnecessary duplication and multiplicity of actions and will promote the interests of judicial economy, convenience, and fairness.

42. This Court has personal jurisdiction over Amazon because Amazon has the requisite constitutional contacts with the United States of America pursuant to 15 U.S.C. § 53(b).

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THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

Case No. 2:23-cv-01495-JHC

AMAZON'S MOTION TO DISMISS

NOTE ON MOTION CALENDAR:
March 22, 2024

ORAL ARGUMENT REQUESTED

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INTRODUCTION AND SUMMARY

Amazon competes every minute of every day with thousands of online and brick-and-mortar retailers. To meet that competition, Amazon has relentlessly innovated, delivering previously unimagined benefits for consumers and pushing competitors to do likewise, all to make every penny of a consumer's purchase count for more. Amazon promptly matches rivals' discounts, features competitively priced deals rather than overpriced ones, and ensures best-in-class delivery for its Prime subscribers. Those practices—the targets of this antitrust Complaint—benefit consumers and are the essence of competition. Because "[a]ntitrust law does not seek to punish economic behavior that benefits consumers," *Coronavirus Rep. v. Apple, Inc.*, 85 F.4th 948, 957 (9th Cir. 2023), the Complaint should be dismissed.

1. Sherman Act claims. To state a Sherman Act claim, the Complaint must plausibly allege facts showing, among other things, that Amazon engaged in anticompetitive *conduct* that has an anticompetitive *effect*.[1] It fails on both fronts.

Failure to allege anticompetitive conduct. The conduct challenged in the Complaint consists of common retail practices that presumptively benefit consumers. The Complaint labels these practices "anticompetitive," but the facts alleged rebut that epithet. Consider the Complaint's allegation that Amazon "rapidly" matches competitors' price cuts. Complaint ("Compl.") ¶ 20, ECF No. 1. Matching rivals' discounts is not, in Plaintiffs' jargon, an "anti-discounting tactic"; it *is* discounting, and the antitrust laws affirmatively encourage it. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-24 (1993). The Complaint also faults Amazon for featuring competitively priced offers, and declining to feature uncompetitive ones, in the "Featured Offer" or "Buy Box." Compl. ¶ 16. As the government previously (and correctly) confirmed, these types of purchasing recommendations from retailers to consumers are "both pro-competitive and

[1] Plaintiffs also must prove that Amazon has monopoly power in a properly defined antitrust market, and the Complaint's highly gerrymandered market is unlikely to survive that test. *See infra* p. 7. That factual dispute need not be resolved in this motion.

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ubiquitous." Br. for the United States at 46, *United States v. Am. Express*, No. 15-1672 (2d Cir. filed Sept. 14, 2015), 2015 WL 5450937, at *46 ("U.S. Amex Br."). Under the Complaint's theory, Amazon would be required to feature what it knows are bad deals.

Finally, the Complaint takes issue with Amazon's practice of highlighting with the Prime badge only those offers that it is confident will meet customers' expectations for fast, free, and reliable delivery. It alleges that Amazon does so to push sellers to use Amazon's fulfillment services. Even if that allegation were true (it is not), such seller recommendations—made to protect trust in a retailer's brand and to deliver products to consumers with unprecedented speed, service, and reliability—are presumptively procompetitive.

Failure to allege plausible anticompetitive effects. Because the challenged conduct is facially procompetitive, Plaintiffs face an even greater challenge to plead facts showing that the conduct nonetheless harmed consumers. The Complaint does not carry that burden.

For Amazon's practice of matching other retailers' discounts, the Complaint cannot meet that burden because such above-cost discounting is not only procompetitive but also categorically lawful.

As to the other challenged practices, the Complaint does not acknowledge the facially procompetitive effects of featuring well-priced offers, let alone assert facts plausibly showing that despite those effects, market-wide prices have risen—whether on average or for any particular product. Indeed, the Complaint does not identify a single product or product category for which prices have risen as a result of the challenged conduct. Instead, it implausibly, and illogically, assumes that Amazon's efforts to keep featured prices low on Amazon somehow raised consumer prices across the whole economy. At most, the Complaint contains vague allegations that a handful of sellers have responded, not by lowering their prices in Amazon's store, but by raising them elsewhere. But anecdotes are insufficient to plead a claim under antitrust law's rule of reason.

The Prime-badge allegations fare no better. The Complaint claims that Amazon's conduct "raises the cost of multihoming" for sellers who offer their products both in Amazon's store and

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elsewhere, and somehow harms "rival … marketplaces" and "independent fulfillment providers." Compl. ¶¶ 355, 396. But it does not, as it must, allege facts that support these conclusory assertions. It provides no factual support at all for its (incorrect) assertion that multihoming sellers "must maintain a separate supply of inventory" for Amazon customers and "a separate fulfillment provider to serve" other customers. *Id.* ¶ 354. And it does not identify a single supposedly "foreclosed" rival. That is no surprise. It defies common sense to suggest that Amazon's use of the Prime badge could have marginalized retail heavyweights like Walmart and Target or delivery incumbents like UPS, FedEx, and the U.S. Postal Service—some of which Amazon uses to deliver orders today—let alone any other entity.

Precisely because Amazon's conduct falls well within settled Sherman Act precedent, the Federal Trade Commission's ("FTC's") current Chair candidly acknowledged in 2017 that it would be necessary to "revise antitrust law" to condemn Amazon's actions. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 805 (2017). Six years later, antitrust law remains unchanged, but the FTC has sued Amazon under the Sherman Act anyway. Those claims are untenable and should be dismissed.

2. "Standalone" FTC Act claims. The weakness of the Complaint's Sherman Act claims explains why the FTC has asked this Court alternatively to condemn the alleged conduct under Section 5 of the FTC Act even if it does not violate the Sherman Act. By bringing these "standalone" claims (Counts III and IV), the FTC implicitly recognizes that it cannot meet its burdens of proof under the Sherman Act. But such claims must be dismissed because the FTC lacks statutory authority to ask a district *court*, in the first instance, to determine whether conduct that would not otherwise violate the antitrust laws is "unfair" under Section 5 of the FTC Act. The FTC must first make such a novel "unfairness" determination in its administrative court. Indeed, this Court would be the first Article III court ever to decide in the first instance that a defendant's competitive methods are "unfair" under Section 5 of the FTC Act even though they do not violate the Sherman Act. Count IV also should be dismissed on two additional grounds: the FTC's

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standalone claim about the long-discontinued "Nessie" experimental program is (1) irreconcilable with settled Section 5 precedent and (2) untimely.

3. State law claims. The state law claims fail for several, often overlapping, reasons. For example, all state-law claims paralleling the Sherman Act claims fail for the same reasons the Sherman Act claims fail (and at least one state does not have a state equivalent to Section 2 of the Sherman Act), state-law claims premised on consumer-protection theories are not supported by any facts in the Complaint, and state antitrust laws that are territorially limited cannot support claims against business practices that, like those alleged here, are inherently interstate in nature.

STATEMENT OF THE CASE

A. The Complaint's Allegations

Amazon's store. When Amazon first opened for business, it "sold goods to shoppers by purchasing items wholesale and reselling them on its website." Compl. ¶ 68. The Complaint uses the term "Amazon Retail" to refer to this traditional vendor-retailer relationship, which Amazon continues to use today. *Id.* ¶ 70. When pricing its Retail products, Amazon tries to match the lowest price its competitors are charging for those products. *Id.* ¶ 329. Years ago, Amazon experimented with an automated pricing system—"Nessie"—that would, for "limited" products and duration, match to the second-lowest competitor instead of the absolute lowest. *Id.* ¶¶ 419-22. Amazon stopped those "Nessie" experiments in 2019, *id.* ¶ 430, and today continues to match to the lowest price, *id.* ¶ 329.

In 2000, Amazon pursued a "Marketplace" idea, inviting third-party sellers to sell directly in its store "side-by-side" with Amazon Retail. Compl. ¶¶ 71, 76. By 2021, more than 560,000 active third-party sellers operated in Amazon's store. *Id.* ¶ 74. That innovation benefited both consumers, by "exponentially expand[ing] the selection of products" available to them, *id.* ¶¶ 74, 78, and third-party sellers, who now make the majority of sales in Amazon's store, *id.* ¶ 75. As the FTC's current Chair previously acknowledged, consumers "universally seem to love" Amazon

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because it has "delivered enormous benefits to [them]—not to mention revolutionized e-commerce." Khan, *supra* p. 3, at 714, 716.

"[S]hopper[s] browsing on Amazon" observe "no obvious differences" between Amazon Retail listings (where Amazon sets the price and controls the delivery experience) and third-party seller listings (where third-party sellers set the price and control the delivery experience). Compl. ¶¶ 19, 76, 192-96. Moreover, in many instances, a single product offered for sale in Amazon's store—such as a 5-pack of "Pilot G2 Premium Gel Roller Pens"—is "offered by more than one seller." *Id.* ¶¶ 83-84. To make the experience of choosing among these offers more convenient, Amazon developed a method of featuring the offer most likely to be preferred by customers. *Id.* ¶ 84. Amazon "calls this displayed offer the 'Featured Offer'" and "[b]eing chosen as the Featured Offer is commonly known as 'winning' the Buy Box." *Id.*; *compare id.* Fig. 4a (displaying Amazon's Featured Offer for 5-pack of "Pilot G2 Premium Gel Roller Pens"), *with id.* Fig. 5a (displaying additional offers for 5-pack of "Pilot G2 Premium Gel Roller Pens" with different prices, ship speeds, sellers, and seller star ratings).

Amazon works hard to ensure that the Featured Offer it selects for any given product will provide a good experience for customers. Third-party sellers in Amazon's store set their own prices for the products they offer, and Amazon generally makes all such offers available to customers. Compl. ¶¶ 19, 86. But Amazon will not select a third-party seller's offer to be the Featured Offer if it knows that another reputable retailer is offering the same product for less elsewhere. *Id.* ¶ 277. Indeed, Amazon would rather feature no offer—and therefore not display a "Buy Box" at all for certain products—if doing so risks losing a customer's trust. *Id.* According to the Complaint, Amazon also has required that certain "important" sellers offer competitive prices, wide selection, and reliable in-stock availability to help maintain Amazon's reputation for a great customer experience. *Id.* ¶¶ 288, 291-92.[2]

[2] Under this policy, Amazon may source certain sellers' products at wholesale, and offer them directly to customers. *See* Standards for Brands Selling in the Amazon Store, https://sellercentral.amazon.com/help/hub/reference/external/G201797950?locale=en-US.

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Amazon develops fulfillment services and launches Amazon Prime. Amazon also invested in a fulfillment infrastructure to give customers access to two-, one-, and sometimes same-day delivery. "[F]ulfillment is a significant business cost." Compl. ¶ 110. Thus, in 2006, Amazon made the lower-cost infrastructure it had developed for its own offerings available to third-party sellers, in a program known as "Fulfilment by Amazon" ("FBA"). *Id.* ¶ 108. A seller's voluntary participation in FBA—through which sellers send products to Amazon fulfillment centers, and Amazon then stores, retrieves, packages, and coordinates delivery of the product, *id.* ¶¶ 109-12—allows sellers to ship goods quickly and reliably without paying the higher fees it would otherwise have to pay the shipping incumbents. *Id.* ¶ 110; *see also* Khan, *supra* p. 3, at 779 (FBA "offer[ed] independent sellers the ability to ship goods more cheaply and quickly than they could by using UPS and FedEx directly"). Participation in FBA also assures that the seller meets Amazon's high standards for delivery speed and reliability, although sellers are free to demonstrate their commitment to those standards through other means.[3]

Amazon launched Prime in 2005 as a service for customers that includes free two-day shipping in exchange for a membership fee. Compl. ¶ 98. Only certain of the products in Amazon's store, however, meet the criteria to be Prime-eligible. *Id.* ¶¶ 98, 104. To assist customers looking for the fast, free, and reliable shipping associated with Prime, Amazon therefore "displays a 'Prime Badge' to show Prime subscribers which items are eligible." *Id.* ¶ 103. And to help assist customers looking for products with fast, free shipping, Amazon also allows customers to "filter their searches to display only Prime-eligible offers." *Id.* ¶ 104.

***Amazon's competition*.** Amazon developed these innovations because it faces competition from thousands of rivals across its product categories. These competitors range from countless

[3] Amazon does not in fact condition the Prime Badge on use of FBA. In 2015, Amazon created a program called Seller Fulfilled Prime ("SFP"), Compl. ¶ 398, which it maintains today, *id.* ¶ 409. SFP permits third-party sellers to obtain the Prime badge on offers even if they do not use FBA. The Complaint misleadingly states that Amazon "shuttered SFP" in 2019, *id.*, but elsewhere acknowledges that Amazon merely paused "*new enrollment* in SFP," *id.* ¶ 404, a temporary step taken to address speed and performance issues. Amazon has reopened new enrollment in SFP. *See* Seller Fulfilled Prime, https://sell.amazon.com/programs/seller-fulfilled-prime.

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smaller retailers to massive online and brick-and-mortar operations of household names like Walmart, Target, Best Buy, Home Depot, Kroger, Costco, Staples, Walgreens, Nike, Apple, and many others. Amazon competes with these retailers on a number of dimensions. As alleged in the Complaint, for example, retailers compete by "offering shoppers lower prices," Compl. ¶ 264; offering "features that meaningfully reduce the time and effort shoppers expend online," such as those that help consumers "compare different items," *id.* ¶¶ 122, 126; developing "long-term relationships with shoppers" that "encourage them to come back again," *id.* ¶ 126; "maintaining the perception among shoppers that [the retailer] has the lowest prices," *id.* ¶ 262 (emphasis omitted); and providing "a convenient and consolidated post-purchase experience," *id.* ¶ 138. The Complaint likewise alleges that the customer beliefs a retailer can cultivate—such as "a positive reputation" and whether "the shopper finds the online store particularly trustworthy and reliable"—improve a retailer's ability to compete. *Id.* ¶¶ 130, 149.

The Complaint nonetheless alleges that there is a separate relevant market within retail that includes only "online superstores." Compl. ¶ 122. That notional market excludes (1) the online stores of all retailers except the few alleged to be "superstores" and (2) the brick-and-mortar stores of all retailers, even including the brick-and-mortar stores of alleged "superstores." By alleging a market around certain "stores," the Complaint fails to allege a *product* market that "encompass[es] the product at issue as well as all economic substitutes for the product.'" *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018) (quoting *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008)). Apart from that fatal flaw, the Complaint's "online superstore" market is implausible because it suggests, for example, that consumers would not consider buying a low-priced TV on bestbuy.com only because Best Buy does not also sell shoes or cosmetics and is thus not a "superstore."[4] Nonetheless, because "the validity of the 'relevant market' is typically a factual

[4] The "online superstores" market also assumes customers seeking cough medicine might comparison-shop between Amazon.com and Walmart.com, but not call their local Walgreens, even if it offered lower prices and was a short walk away.

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element," *Newcal Indus.*, 513 F.3d at 1045, this motion focuses on the other reasons the Complaint fails to state a claim even under its contrived market definition.

B. The Complaint's Claims

The FTC asserts Sherman Act claims in Counts I and II; the States have filed parallel Sherman Act claims in Counts V and VI. All of those claims rest on allegations related to three business practices. First, the Complaint condemns Amazon Retail for competing on price by matching its rivals' discounts. Compl. ¶¶ 266-68. Second, the Complaint attacks Amazon's practice of seeking to highlight only competitively-priced products. *Id.* ¶¶ 272-85 (featured offer policies); *id.* ¶¶ 286-304 (ASB policy). Third, the Complaint alleges that Amazon gives undue preference, when assigning the Prime badge, to third-party sellers who use Amazon's fulfillment services. *Id.* ¶¶ 351-409. The Complaint does not specify a remedy, identify the alternative conduct it believes Amazon should have engaged in (such as still featuring offers when it knows a customer could buy the same product for less elsewhere), or allege how any alternative "but for" world would be better for consumers.

The FTC alternatively alleges in Count III that the same three business practices violate Section 5 of the FTC Act even if they do not violate the Sherman Act. And Count IV challenges the discontinued "Nessie" automated pricing experiment under the FTC Act alone (the Complaint does not allege that it violated the Sherman Act).

Finally, Counts VII–XX allege various state law violations.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM OF ANTICOMPETITIVE MONOPOLY MAINTENANCE UNDER SECTION 2 OF THE SHERMAN ACT.

The three business practices attacked in the Sherman Act claims are far from anticompetitive: they are, instead, the very essence of competition. It is thus no surprise that the Complaint fails to allege *facts* that could transform Plaintiffs' conclusory assertions of harm to consumers from "conceivable" to "plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

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Decision to accept binding commitments under the Competition Act 1998 from Amazon in relation to conduct on its UK online marketplace

Case number 51184

3 November 2023

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [✂]. Some numbers have been replaced by a range. These are shown in square brackets.

Contents

1. Introduction and summary

1.1 In this decision (the '**Decision**') made under section 31A of the Competition Act 1998 (the '**Act**'), the Competition and Markets Authority (the '**CMA**') accepts the commitments offered by entities operating Amazon's UK online marketplace (the '**UK Amazon Marketplace**'), including Amazon.com, Inc., Amazon UK Services Ltd, Amazon Europe Core SARL, Amazon Services Europe SARL, and Amazon EU SARL, and its successors and assigns, its connected undertakings, subsidiaries, divisions, and groups ('**Amazon**'), as set out in the Annex to this decision (the '**Commitments**').

1.2 The Commitments were offered by Amazon to address the competition concerns identified by the CMA; namely that from at least January 2021 Amazon has engaged in conduct that may have abused, and/or continues to abuse, its dominant position in the market for the supply of e-commerce marketplace services to third-party sellers to reach customers in the UK. In brief, the CMA's competition concerns (which are set out in more detail in Chapter 4 of this Decision) are that:

(a) Amazon uses data relating to, and/or derived from, the commercial activities of third-party sellers to inform business decisions by its retail arm ('**Amazon Retail**') when competing against those sellers on the UK Amazon Marketplace;

(b) Amazon sets and applies the conditions and criteria for selecting the 'Featured Offer'[1] on product pages in a discriminatory manner, such that Amazon Retail and sellers that use Amazon's fulfilment services are unfairly advantaged over other sellers; and

(c) third-party sellers that use carriers other than Amazon's fulfilment services or Royal Mail are unable to independently negotiate terms and rates for Prime delivery services with those carriers and must instead use the terms and rates that have been agreed by Amazon with those carriers.

1.3 The Commitments will ensure that:

(a) Amazon will not use non-public data provided by third-party sellers to Amazon or derived through their use of Amazon's marketplace services (or related services) for the purposes of its own retail operations that are in competition with third-party sellers. Specifically,

[1] The Featured Offer is displayed prominently on Amazon's product pages and provides customers with one-click options to 'Buy Now' or 'Add to Basket' in relation to items from a specific seller. The display of the Featured Offer with the associated 'Buy Now' and 'Add to Basket' options is commonly referred to as the 'Buy Box' or 'offer display'.

Amazon must not use such data to inform decisions to identify and add Amazon Retail offers; identify vendors or negotiate prices and terms; make decisions to start and stop purchasing products; inform inventory planning for products; or inform pricing decisions (the '**Seller Data Commitments**').

(b) Amazon will apply objectively verifiable, non-discriminatory conditions and criteria to determine which offer (either from Amazon Retail or third-party sellers) will become the Featured Offer and will not use Prime-eligibility or Prime labelling as relevant criteria for selecting the Featured Offer (the '**Buy Box Commitments**').

(c) Amazon will allow the use of independently negotiated rates between carriers and sellers in respect of Prime-eligible offers, provided the carrier has connected with Amazon's systems in the appropriate manner. Amazon will make reasonable means available to enable Interested Carriers[2] to connect with Amazon's systems, and will not use any information obtained for the purposes of Amazon's own fulfilment operations or commercial negotiations regarding fulfilment services (the '**SFP Rates Commitments**').

1.4 This Decision follows a public consultation on proposed commitments offered by Amazon (the '**Proposed Commitments**'). On 26 July 2023, the CMA gave notice, under paragraph 2 of Schedule 6A to the Act, that it intended to accept the Proposed Commitments offered by Amazon and invited views from persons likely to be affected (the '**Consultation**').

1.5 Further to the CMA's consideration of views submitted to it during the Consultation, the CMA sought from Amazon minor edits to the Proposed Commitments, so as to (i) ensure the consistent application of a safeguard protecting against a potential risk arising from the operation of the Commitments, and (ii) clarify the drafting in one paragraph of the Proposed Commitments. To address these issues, Amazon offered revised commitments pursuant to which the restrictions on Amazon's use of rate-related information that may be provided to it by carriers pursuant to the SFP Rates Commitments would cover not only rate but also non-rate-related information.[3] Amazon also revised the Proposed Commitments to (i) expressly state that Amazon will only require information from Interested Carriers that is necessary for the purpose of supporting independently negotiated rates, whereas this obligation was ambiguous under the Proposed Commitments, and (ii) clarify that the monitoring trustee shall verify that the

[2] 'Interested Carrier' is defined in the Commitments to mean '*any Carrier who seeks to use independently negotiated rates and commercial terms and conditions with Sellers in respect of Prime-eligible Offers*'.
[3] See paragraphs 6.51 to 6.53 of this Decision.

information sought '*does not go beyond*' what is necessary. The revisions do not change the way in which the Commitments address the competition concerns identified by the CMA; rather, they are ancillary provisions intended to help to protect carrier information provided to Amazon under the Commitments.

1.6 For the reasons set out in this Decision, the CMA, having fully assessed in the round the evidence and responses to the Consultation against the factors set out in the CMA's Guidance on its investigation procedures under the Act (the '**Procedural Guidance**'),[4] has concluded that it is appropriate to accept the Commitments (as amended) to address the competition concerns it has identified. As a result of accepting the Commitments, the CMA has discontinued its investigation (the '**Investigation**') with no decision made as to whether or not Amazon infringed the prohibition in section 18(1) of the Act (the '**Chapter II prohibition**').[5] The offer of the Commitments by Amazon does not constitute an admission of any infringement by Amazon.

1.7 Acceptance of the Commitments does not prevent the CMA from taking any action in relation to competition concerns which are not addressed by the Commitments. Moreover, acceptance of the Commitments does not prevent the CMA from continuing its Investigation, making an infringement decision, or giving a direction in circumstances where the CMA has reasonable grounds for:

(a) believing that there has been a material change of circumstances since the Commitments were accepted;

(b) suspecting that a person has failed to adhere to one or more of the terms of the Commitments; or

(c) suspecting that information which led the CMA to accept the Commitments was incomplete, false or misleading in a material particular.[6]

1.8 If a person from whom the CMA has accepted commitments fails, without reasonable excuse, to adhere to the commitments, the CMA may apply to the

[4] Guidance on the CMA's investigation procedures in Competition Act 1998 (CMA8, 31 January 2022), paragraphs 10.15 – 10.25. Section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, the CMA may accept, from such person or persons concerned as it considers appropriate, commitments to take such action (or refrain from such action) as it considers appropriate. The Procedural Guidance describes the circumstances in which the CMA is likely to consider it appropriate to accept binding commitments and the process by which parties to an investigation may offer commitments to the CMA.
[5] Section 18(1) of the Act prohibits any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market if it may affect trade within the United Kingdom, or any part(s) of the United Kingdom, unless any of the excluded cases pursuant to section 19 of the Act apply. For these purposes, a dominant position means a dominant position within the United Kingdom or any part(s) of the United Kingdom.
[6] Section 31B(4) of the Act.

court for an order requiring, among other matters, the default to be made good.[7]

1.9 The CMA expects to assume responsibilities to regulate certain firms' conduct in relation to specific digital activities under the proposed new regime for digital markets set out in the Digital Markets, Competition and Consumers Bill, introduced before Parliament in April 2023. Under the proposed new regime, the CMA may introduce requirements governing a digital activity carried out by an undertaking if the undertaking is designated as having Strategic Market Status in relation to that digital activity. Any decision to designate firms with Strategic Market Status will be taken based on a detailed assessment applying the test set out in the final legislation. If the CMA decides to designate Amazon as having Strategic Market Status in relation to any digital activity (or activities) and imposes requirements under the new regime, those requirements may apply alongside the Commitments, or – where they overlap and render the Commitments unnecessary in whole or part – may result in the Commitments being varied or terminated in whole or in part.

1.10 The remainder of this Decision is structured as follows:

- an overview of the CMA's investigation (Chapter 2);
- background information regarding Amazon and the relevant market context (Chapter 3);
- details of the CMA's competition concerns (Chapter 4);
- a summary of the Commitments (Chapter 5);
- the CMA's assessment of the appropriateness of commitments in this case (Chapter 6);
- the CMA's decision to accept the Commitments (Chapter 7); and
- the text of the Commitments (Annex).

[7] Section 31E of the Act.

Mergers: Commission opens in-depth investigation into proposed acquisition of Arm by NVIDIA

Brussels, 27 October 2021

The European Commission has opened an in-depth investigation to assess the proposed acquisition of Arm by NVIDIA under the EU Merger Regulation. The Commission is concerned that the merged entity would have the ability and incentive to restrict access by NVIDIA's rivals to Arm's technology and that the proposed transaction could lead to higher prices, less choice and reduced innovation in the semiconductor industry.

Executive Vice-President Margrethe **Vestager**, responsible for competition policy, said: *"Semiconductors are everywhere in products and devices that we use everyday as well as in infrastructure such as datacentres. Whilst Arm and NVIDIA do not directly compete, Arm's IP is an important input in products competing with those of NVIDIA, for example in datacentres, automotive and in Internet of Things. Our analysis shows that the acquisition of Arm by NVIDIA could lead to restricted or degraded access to Arm's IP, with distortive effects in many markets where semiconductors are used. Our investigation aims to ensure that companies active in Europe continue having effective access to the technology that is necessary to produce state-of-the-art semiconductor products at competitive prices."*

NVIDIA develops and supplies processor products for various applications, including in datacentres, Internet of Things ('IoT'), automotive applications and gaming. **Arm** licenses out intellectual property ('IP') for processing units, in particular to semiconductor chipmakers and Systems-on-Chip ('SoC') developers. By acquiring Arm, NVIDIA would gain full control over Arm's technology and licensing business.

The Commission's preliminary competition concerns

Following its preliminary investigation, the Commission considers that Arm has significant market power on the market for the licensing of Central Processing Unit ('CPU') IP for use in processor products. Therefore, the Commission has concerns that the merged entity would have the ability to restrict or degrade access to Arm's technology by providers of processor products NVIDIA may compete with. The preliminary investigation suggests that the merged entity would also have the economic incentive to engage in such foreclosure strategies which could reduce competition in the market for the supply of processor products across different fields of application:

- **datacentre CPUs**;
- **smart network interconnects ('SmartNICs')** used in datacentres to offload network, storage, and security processing from the CPU to reduce its workload and accelerate its processing;
- semiconductors used for **automotive advanced driver-assistance systems ('ADAS')**, which encompass a broad range of technical features enabling vehicles to assist the driver;
- semiconductors used in **infotainment applications**, which refers to in-vehicle information and entertainment for drivers and passengers and includes various features, such as audio and video playback, automotive navigation systems, USB and Bluetooth connectivity, internet access, and Wi-Fi;
- SoCs equipping **high-performance IoT devices**;
- SoCs used in **gaming consoles**;
- SoCs used in **general-purpose PCs**.

The Commission will now carry out an in-depth investigation into the effects of the transaction to determine whether its initial competition concerns regarding these markets are confirmed.

In addition, the Commission will also further examine:

- Whether the transaction might stifle innovation because Arm licensees might be reluctant to

continue sharing **commercially sensitive information** with the merged entity because they are competing with NVIDIA.

- A potential **refocussing of Arm's R&D spending** on products that are most profitable for NVIDIA downstream, to the detriment of players heavily relying on certain Arm IP in other areas.

During the initial investigation, the Commission has been closely cooperating with competition authorities around the world. The Commission will continue this cooperation also during the in-depth investigation.

The proposed transaction was notified to the Commission on 8 September 2021. On 6 October 2021, NVIDIA submitted commitments to address some of the Commission's preliminary concerns. However, the Commission considered these commitments insufficient to clearly dismiss its serious doubts as to the effect of the transaction. The Commission therefore did not test them with market participants.

The Commission now has 90 working days, until **15 March 2022** to take a decision. The opening of an in-depth inquiry does not prejudge the final result of the investigation.

Companies and products

NVIDIA, headquartered in the US, invented the graphics-processing unit ("GPU") in 1999. NVIDIA specialises in markets in which GPU-based visual computing and accelerated computing platforms can provide enhanced throughput for applications. NVIDIA's products cover areas in gaming, professional visualisation, datacentres and automotive. Through its acquisition of Mellanox, approved by the Commission in December 2019 and completed in April 2020, NVIDIA also supplies network interconnect products and solutions.

Arm, headquartered in the UK, is owned and controlled by SoftBank Group Corp., a Japanese multinational holding company which owns stakes in many technology, energy and financial companies and runs Vision Fund, the world's largest technology-focused venture capital fund. Arm designs semiconductor and software solutions. It licenses out core architectures and intellectual property for processing units, in particular to semiconductor chipmakers and SoC developers that incorporate the technology into their own chips. Arm's primary business is the design of IP for CPUs for mobile devices, embedded devices, datacentre and automobile applications, among others.

Merger control and procedure

The Commission has the duty to assess mergers and acquisitions involving companies with a turnover above certain thresholds (see Article 1 of the Merger Regulation) and to prevent concentrations that would significantly impede effective competition in the EEA or any substantial part of it.

The vast majority of notified mergers do not pose competition problems and are cleared after a routine review. From the moment a transaction is notified, the Commission generally has 25 working days to decide whether to grant approval (Phase I) or to start an in-depth investigation (Phase II).

In addition to the current transaction, there are currently six on-going Phase II merger investigations: the proposed acquisition of Kustomer by Facebook, the proposed acquisition of Grail by Illumina, the proposed merger between Cargotech and Konecranes, the proposed acquisition of Air Europa by IAG, the proposed acquisition of Trimo by Kingspan Group and the proposed acquisition of DSME by HHiH.

More information will be available on the Commission's competition website, in the Commission's public case register under the case number M.9987.

IP/21/5624

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Ofcom

Cloud services market study

Final report

Redacted [✂] for publication

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Overview

1.1 Cloud computing is being rapidly adopted by businesses across the economy and has become an essential part of how digital services are delivered to consumers, including in the telecoms and broadcasting sectors. Ofcom has carried out a market study into the supply of cloud services in the UK to explore if these markets are working well and whether any regulatory action is required.[1] This final report sets out our findings and recommendations.

Our final report – in brief

'Cloud computing' is the provision of remote access to computing resources (such as compute, storage and networking) on demand and over a network. Cloud computing has both transformed the way businesses and organisations of all types and sizes run their operations and become a critical input to the digital services we all rely on each day.

Our study is focused on 'cloud infrastructure services', which are built on physical servers and virtual machines hosted in data centres around the world. Cloud infrastructure provides the foundation for how software applications are developed and run. This consists of products called infrastructure as a service (IaaS) which includes storage, computing and networking, and platform as a service (PaaS) which includes the software tools needed to build and run applications. The market for cloud infrastructure in the UK was worth £7.0 billion to £7.5 billion in 2022.

There are two leading providers of cloud infrastructure services in the UK: Amazon Web Services (AWS) and Microsoft, who had a combined market share of 70% to 80% in 2022.[2] Google is their closest competitor with a share of 5% to 10%. Collectively these firms are referred to as the 'hyperscalers' and the vast majority of customers use their cloud services in some form. A diverse set of independent software vendors (ISVs) build their products on cloud infrastructure from the hyperscalers, but also compete directly with some of their services.

Our study has found that competition between cloud providers is mainly focused on attracting new customers when they first move into the cloud. We see evidence of some positive outcomes for customers, including product innovation, discounts and a wide choice of software services from ISVs. However, our view is that competition is being limited by market features that make it more difficult for customers to switch and use multiple suppliers (known as 'multi-cloud'). The features we are most concerned about are:

- egress fees are the charges that customers pay to transfer their data out of a cloud. The cost of transferring data between rival providers can discourage customers from using more than one cloud provider and in some cases make switching more costly.
- technical barriers mean that customers need to put additional effort into reconfiguring their data and applications to work on different clouds. A lack of interoperability and portability can restrict the ability of customers to switch and multi-cloud.

[1] On 6 October 2022, we published a market study notice in accordance with section 130A of the Enterprise Act as amended and applied by section 370 of the Communications Act.
[2] We used a combination of data sources to estimate market shares and present our estimates in ranges for confidentiality reasons. See Annex 1 for more details.

- committed spend discounts can benefit customers by reducing their costs, but the way these discounts are structured can incentivise customers to use a single cloud provider for all or most of their cloud needs. This can make it less attractive to use rival providers as part of a multi-cloud strategy.

As a result, we are concerned that a material number of customers, especially those with more complex requirements, may face significant barriers to switching and multi-cloud. We expect this will be true of an increasing number of customers as the market matures. Some customers have told us they are already concerned about being 'locked in' to their current provider.

Limits on the ability of customers to credibly threaten to switch away can reduce the competitive pressure on the market leaders, giving them a degree of market power. This creates the risk of harm for cloud customers, either by paying higher prices than would have been the case or being denied access to innovative products, which in turn can lead to negative impacts for UK consumers. High levels of profitability for the market leaders AWS and Microsoft and a gradual increase in market concentration are consistent with limits to the overall level of competition.

Looking ahead, if customers have difficulty switching and using multiple providers, it could make it harder for competitors to gain scale and challenge AWS and Microsoft effectively for the business of new and existing customers. There could be long lasting impacts if this leads the market to become more concentrated, with barriers to switching and multi-cloud allowing the market leaders to entrench their positions and avoid competing vigorously. This could have implications for ISVs, especially where they become more dependent on the market leaders for access to customers.

A cloud infrastructure market that is working well is critical for businesses across the economy and everyone who makes use of digital services. Given the concerns we have identified, we have decided to refer the cloud infrastructure market to the Competition and Markets Authority (CMA) to carry out a market investigation. The CMA will now conduct an independent investigation to decide whether there is an adverse effect on competition, and if so, whether it should take action or recommend others to take action.

Cloud computing is important to the markets Ofcom regulates and the wider economy

1.2 Cloud computing has been widely adopted by UK businesses across the economy. Compared to the traditional model, where businesses purchase and maintain their own physical computing resources and software, cloud computing is faster to deploy, more flexible and potentially cheaper. This supports innovation and growth, for example by allowing businesses offering digital services to scale up quickly and cost effectively.

1.3 It is an increasingly important input to the different elements that make up the internet, which means it is essential for providing online services used by many UK consumers including social media, streaming, and communications services. Cloud computing is expected to underpin the development of artificial intelligence (AI) as it provides the computing resources and infrastructure needed to train and deploy AI models at scale.[3] AI is also expected to enhance the functionality of software applications that run in the cloud.

[3] See more generally, the recently published initial report by the CMA on AI Foundational Models [accessed 18 September 2023].

1.4 This technology is also changing how services in the telecoms and broadcasting sectors are being produced and delivered to consumers. In broadcasting we already see extensive use of the cloud by public service and commercial broadcasters, including growing use in the production of TV and video content. Cloud computing is expected to play an increasing role in the delivery of fixed and mobile telecoms, with partnerships emerging between cloud providers and telecoms providers in the UK and internationally.

1.5 If the markets for cloud services are not working well, there could be negative impacts for the businesses that rely on them through higher prices, lower service quality and reduced innovation, that would ultimately be passed on to UK consumers.

AWS and Microsoft are the clear leaders in cloud infrastructure

1.6 The supply of cloud infrastructure in the UK is concentrated, especially at the infrastructure as a service (IaaS) layer, where Amazon Web Service (AWS) and Microsoft are the clear market leaders. AWS and Microsoft account for 70% to 80% of UK IaaS and platform as a service (PaaS) revenues.

1.7 AWS was first to launch cloud services in 2006 and has been able to maintain a significant share as other providers have entered the market. Our analysis indicates that AWS's profitability has been consistently high, with returns significantly above our estimate of the weighted average cost of capital (WACC) since at least 2014. Microsoft is the closest competitor and has grown its share significantly since it entered the market in 2010. We estimate that Microsoft's public cloud division, Azure, is becoming increasingly profitable and that its returns are also above our estimate of the WACC.

1.8 Google is the main challenger to AWS and Microsoft. Google entered the market in 2011 and while its share has grown in recent years, Google remains significantly smaller than the two market leaders, with a 5% to 10% UK share across IaaS and PaaS combined. Google's cloud division recently made a profit for the first time, although this was relatively low compared to the profits of AWS and Microsoft.

1.9 The hyperscalers offer a broad range of complementary services across the different layers of the cloud stack. In addition to selling their own products, they also host PaaS and software as a service (SaaS) products developed by independent software vendors (ISVs) and act as channels for customers to purchase these services, including through marketplaces. These developments suggest that AWS, Microsoft and Google are each building their own 'ecosystems', that provide customers with access to a broad portfolio of their own and others' products in a single place that work together seamlessly.

1.10 Beyond the hyperscalers, there is a range of relatively smaller cloud providers present in the UK, including some who also operate across all parts of the cloud stack. These include large technology companies such as Oracle and IBM, who both have considerably smaller market shares at around 0% to 5% of UK IaaS and PaaS revenues. These providers are more distant competitors to the hyperscalers, partly because of the difficulty of building a rival ecosystem of products delivered over a global network of data centres.

1.11 A wide range of ISVs compete mainly in PaaS and tend to specialise in a particular area, such as databases or analytics, rather than across several different product categories.

Collectively they account for a significant share of 30% to 40% of UK PaaS revenues, but our analysis suggests no single ISV has a share greater than 5%.

Competition is currently focused on attracting new customers who are moving to cloud for the first time

1.12 The UK cloud infrastructure market is growing, with overall revenues increasing at a rate of 35% to 40% annually in recent years. It features a diverse range of customers from different sectors across the economy, each with different requirements. Some have more recently moved to the cloud, either as new start-ups or later adopters. Other more established businesses expect to move more of their data and applications into the cloud over time. Large enterprises account for a high proportion of providers' revenues and their behaviour is particularly important for the competitive dynamics of the market.

1.13 The initial choice of cloud provider is a critical moment for customers. Once a customer chooses a provider they are likely to increase their usage with that provider over time, particularly where it becomes costly to switch away or introduce an additional provider. This means competition between the hyperscalers is mainly focused on attracting new customers into their ecosystems when they first move into the cloud. Significant discounts are offered in return for committed spend by larger customers, alongside technical support to help businesses move applications into the cloud.

1.14 Once customers are established in the cloud there are clear benefits to adopting a multi-cloud strategy to get access to the best quality services, build resilience into their cloud architecture and strengthen the bargaining position with their provider. We are aware of some larger and more sophisticated customers who are adding a second cloud provider for specific use-cases. However, we have found few cases where customers are able to take an approach to multi-cloud that allows them to realise the full benefits, where different applications integrate seamlessly across clouds with data being transferred between them.

1.15 There are indications that competition for new customers is leading to some positive outcomes. Providers are investing in their offerings to match product development by their rivals and we see some evidence that they are responding to customer demand for open-source technologies, for example by adopting containers.[4] Customers also have access to a diverse range of services from ISVs, including some that meet very specialist use cases, that are developed and run using cloud infrastructure as the foundation.

We are concerned about features of the market that create barriers to switching and multi-cloud

1.16 Given the complex nature of customer requirements in the cloud and technical variations between the solutions offered by different providers, there are always likely to be inherent barriers to switching and using multiple providers.

1.17 However, we have identified some features of the market that raise barriers to effective competition by making it more difficult for customers to switch and multi-cloud than might

[4] A container is a package of software that bundles an application's code with any necessary software required for the application to run (e.g. configuration files and libraries).

otherwise be the case. The features we are most concerned about are the charging of egress fees, technical barriers and the structure of committed spend discounts. We suspect that these practices, either alone or acting in combination, can limit the ability of customers to switch provider or adopt a more integrated multi-cloud strategy.

The cost of egress fees can discourage customers from switching or using multiple cloud providers

1.18 Some cloud providers charge customers when they transfer data out of their cloud. This includes when they transfer data to end users and when they transfer data into a rival provider's cloud. These charges are known as egress fees. Egress fees can create significant additional cost and uncertainty for customers where they need to move data between providers on a regular basis. For example, where a business uses servers and storage in one cloud but wants to use the analytics service of a rival cloud that better suits its needs. Egress fees are also a commercial consideration when customers look to switch away from their existing cloud provider, particularly where they need to gradually move data and applications across to their new provider during the switching process.

1.19 Each of the hyperscalers charge a similar level of egress fees, which are around 5-10 times higher than some other cloud providers, such as OVHcloud and Oracle. Some cloud providers do not charge for egress at all. Our analysis indicates that egress fees at their current level are unlikely to be necessary for cost recovery and that egress list prices are likely to be higher than the incremental costs of providing the service.

1.20 Egress fees are a key concern for existing customers because they significantly increase the cost of taking a service from a different cloud provider. Our customer research found that 78% of respondents thought egress fees should be reduced or removed. We have heard examples where customers design their cloud architectures to intentionally avoid and reduce the cost of egress, which means they are unable to benefit from services from rival providers that may better suit their needs. This suggests that for some customers the costs associated with egress fees are likely to be significant enough to act as barrier to using multiple suppliers as part of a multi-cloud strategy.

Technical barriers can limit the ability of customers to combine products from different providers or switch their main provider

1.21 The way different cloud services work together technically is a complex area that has a significant bearing on how competition works in cloud infrastructure. Where this works well, it can unlock significant benefits for customers by giving them access to the best products. However, a lack of interoperability and portability between services can result in customers needing to put additional effort into reconfiguring their data and applications so they can work on different clouds. This makes it more difficult to combine different services across cloud providers or to change primary provider.

1.22 Some of this complexity stems from technical differentiation between cloud providers, which can be the result of innovation which benefits customers. However, we are concerned that some of the barriers which arise from technical differentiation are not justified.

1.23 We have seen evidence of differences in the way AWS and Microsoft make the functionality of their cloud infrastructure services available when combined with their own services compared to those of competitors. Sometimes functionality is made available to competitor

services only after a delay, or in some cases not at all. Cloud providers, in particular AWS and Microsoft, may not always be fully transparent about the compatibility of their cloud infrastructure services with competing services from rivals, including ISVs.

1.24 Differentiation between providers for ancillary services (such as security, access management, monitoring and billing) may be greater than is necessary, thereby increasing complexity and cost of multi-cloud deployments. We have seen evidence that technical solutions (such as direct connection of data centres) exist to address the latency issues that can arise with multi cloud, but we find relatively little take up by the industry. While tools are available that facilitate switching and multi-cloud, we find these are limited and mostly focussed on hybrid cloud deployments - which combine on-premises and public cloud deployments - rather than between clouds.

1.25 Taken together, these barriers could limit the ability of customers to implement different multi-cloud architectures. This is likely to be most acute for customers with large numbers of applications or cloud architectures that are tightly integrated with many first-party proprietary services from their existing provider. These customers can find it more difficult to switch or build their preferred cloud architecture, where they can mix and match the cloud services that most closely meets their needs. Overall, we are concerned that technical barriers could dampen competition by lowering the threat of customers switching all or some of their workloads to benefit from better prices or higher quality cloud services.

The structure of committed spend discounts can encourage some customers to use a single hyperscaler for most or all of their cloud needs

1.26 Committed spend discounts are when a customer agrees to spend a set amount with a single cloud provider in return for a percentage discount. They are usually part of an agreement between the leading providers and their larger customers. Customers with committed spend discounts account for a high proportion of the hyperscalers' UK revenues. An important feature of the discount structure is that the more a customer spends on the provider's cloud services, the greater the discount received.

1.27 Discounting can help customers to negotiate a good deal by committing to a set level of spend. However, the structure of these discounts acts as a barrier to muti-cloud by encouraging larger customers to use a single hyperscaler for all or most of their cloud needs. We have heard that this is an important commercial consideration for these customers, who feel discounting incentives encourage them to purchase most of their services from the same provider.

1.28 The prospect of receiving a lower discount can make it less attractive for customers to use a rival for some of their existing or new workloads.[5] We think this is a particular concern where customers face barriers to switching their existing cloud use. Ultimately this could restrict competition by raising barriers to entry and expansion for smaller cloud providers who cannot compete for customers with a broad set of cloud needs. It could also hamper the ability of rival providers to compete effectively for any new workloads as they emerge.

[5] A workload is a specific application, service, capability or a specific amount of work that can be run on a cloud resource.

These barriers are likely to affect a material number of customers, especially those with more complex needs

1.29 Where there is active competition for new customers, in particular for larger businesses, those customers are likely to have a stronger bargaining position when first migrating to the cloud. However, after a customer makes the initial choice of cloud provider, in many cases AWS or Microsoft, they are more likely to deploy future workloads from within that ecosystem. We think this is partly explained by the barriers we have identified, which we consider are likely to be strong enough to result in a material number of customers having a limited ability to switch or use multiple providers.

1.30 The extent to which customers are affected by the barriers we have identified will depend on their individual needs. Some customers may be able to switch relatively easily as they take few products that are more easily ported between cloud environments (for example, basic IaaS products). Customers may also be able to reduce technical barriers to switching/multi-cloud to some extent by using container services or open-source services that are not specific to a particular cloud environment. In both cases, this is only likely to be feasible for the small number of customers with few applications and simple needs, such as smaller start-ups, and it comes with an additional cost.

1.31 Our evidence suggests that a large portion of the market has more complex needs and faces high barriers to switching or adopting more integrated multi-cloud architectures once they have chosen their primary provider. Large and more mature organisations are likely to be particularly affected. For example, these customers have large numbers of applications and/or use various proprietary services offered by their cloud providers, which add to the complexity of switching cloud provider.

Limits on the ability to multi-cloud and switch can reduce competitive pressure on, and between, the market leaders

1.32 Where customers face material barriers to switching and multi-cloud, this can reduce competitive pressure on providers, as customers cannot credibly threaten to switch all or some of their existing workloads to a rival provider. We suspect that providers, and in particular AWS and Microsoft, hold a degree of market power in respect of the existing and incremental workloads of a material share of existing customers.

1.33 High levels of profitability for the market leaders AWS and Microsoft and a gradual increase in market concentration indicate there are limits to the overall level of competition. Our analysis indicates that AWS's profitability has been consistently high, with returns significantly above the WACC since at least 2014. We estimate that Microsoft's Azure returns have increased in recent years and are also above our estimate of the WACC. At the same time AWS's and Microsoft's share of the UK market has continued to increase, with their combined share of IaaS and PaaS revenues reaching 70-80% in 2022.

1.34 We are concerned that limits on competition create a significant risk of harm to cloud customers. This could lead to higher prices compared to what would be the case if customers could switch or multi-cloud more easily. Customers may also be harmed if there is a more innovative product on offer by a competitor and they cannot switch their existing

workloads. In principle, customers can protect themselves from these future risks when they initially contract with their provider, but in practice their ability to do so is limited due to factors such as the difficulty of forecasting their future demand for cloud services.

1.35 Harms for customers can translate into poor outcomes for UK consumers. Where businesses face higher costs of cloud infrastructure this will ultimately lead to higher prices for the products and services that they provide to consumers.

We are concerned that the level of competition could deteriorate further over the longer-term

1.36 Looking ahead, we think there is a significant risk that the market becomes more concentrated as it matures, with less intense competition between the leading players.

1.37 Where customers have difficulty switching and using multiple providers, it could make it harder for smaller cloud providers to compete for those customers' workloads and grow their business as a result. In a maturing market where the number of new customers will reduce over time, this could make it more difficult for rivals to gain scale and challenge the market leaders effectively. This would be from a point where Microsoft and AWS have already established a strong position today. While it is difficult to predict what the exact market structure will look like in future, it is more certain that the outcome in this scenario would be further concentration around a small number of cloud providers.

1.38 Today we see some evidence that the market leaders have an incentive to compete to win new customers and to a much lesser extent for some narrow sets of additional workloads from existing customers. A weaker competitive constraint from rivals and barriers to switching and multi-cloud would allow the market leaders to entrench their position, while avoiding the need to compete intensely for each other's customers. This could reduce their incentive to discount prices or invest in developing services, either in response to competitive constraints from smaller providers or each other. With fewer new customers to compete for as the market matures, incentives to invest in innovation may reduce further.

1.39 In a more concentrated market, the leaders also have less incentives to support ISVs on their platform to attract new customers. We are concerned this could increase the ability and incentive of the market leaders to foreclose or exploit rival ISVs, for example by acting in ways that favour their own competing products. In turn, this impacts the choice, quality and prices that ISVs are able to offer to their customers.

We are referring the cloud infrastructure market to the CMA for an in-depth investigation

1.40 Our study has found that, while there are some positive signs of competition at present, there are also clear indications that the cloud infrastructure market is not working well. We have identified features of the market that we think have an adverse effect on competition and could result in harm to customers and ultimately UK consumers. If left unchecked, we are concerned that these features could contribute to a further deterioration in competition in what is a critical market for digital services and the UK economy.

1.41 Ofcom may decide to refer a market to the CMA when we have reasonable grounds for suspecting that a feature or combination of features of a market or markets in the UK

prevents, restricts, or distorts competition. We consider that egress fees, restrictions on interoperability and committed spend discounts are barriers that make it more difficult for customers to change provider or use multiple suppliers. We have reasonable grounds to suspect that these features prevent, restrict or distort competition. We have also identified some credible interventions that could address the concerns we have identified.

1.42 On this basis we are referring the market for public cloud infrastructure services to the CMA to carry out a market investigation.[6] In reaching this decision we have assessed our concerns in line with CMA guidance on market investigations. Our assessment is that the legal threshold is met and a market investigation reference is an appropriate response to the concerns we have identified. We therefore exercise our discretion to do so. While we have identified some particular features of the market, it will be open to the CMA to investigate any other issues that it considers appropriate.

1.43 A market investigation reference is a significant step for us to take. Our decision reflects the importance of cloud computing to UK consumers and businesses and the significant concerns we have about the public cloud infrastructure market. The CMA will now conduct an independent investigation to decide whether there is an adverse effect on competition. Should it find an adverse effect on competition, the CMA will decide whether action should be taken to remedy, mitigate or prevent this or its detrimental effects on customers. The CMA has the ability to impose a broad range of remedies in response.

We have also heard concerns about how software licensing practices could impact competition in cloud infrastructure

1.44 Some suppliers of cloud services have raised concerns with Ofcom regarding the software licensing practices of some cloud providers, particularly Microsoft. The concerns centre on the way Microsoft sells and licences some of its software products used by businesses. Among others, these include the Windows operating system, Microsoft SQL Server (a database management system) and the Microsoft 365 productivity suite (known as Office).

1.45 We have received submissions that say Microsoft engages in several practices that make it less attractive for customers to use Microsoft's licensed software products on the cloud infrastructure of rival providers compared to Microsoft Azure. The submissions allege that this limits their ability to compete for customers. Microsoft disputes the veracity of the concerns.

1.46 It is possible that the alleged conduct could risk dampening competition in cloud infrastructure services. We make no findings in relation to the complaints themselves in this report. It will be for the CMA to decide whether to investigate these issues further during the market investigation.

[6] Annex 6. Ofcom, 2023. Terms of reference.

Commission launches calls for contributions on competition in virtual worlds and generative AI

Brussels, 9 January 2024

The European Commission has launched today two calls for contributions on competition in virtual worlds and generative artificial intelligence ('AI') and sent requests for information to several large digital players.

All interested stakeholders are invited to share their experience and provide feedback on the level of competition in the context of virtual worlds and generative AI, and their insights on how competition law can help ensure that these new markets remain competitive. The European Commission will carefully review all input received through the calls for contributions. Following that review, the Commission may organise a workshop in the second quarter of 2024 to bring together all different perspectives emerging from the contributions and continue this reflection.

In addition, the European Commission is looking into some of the agreements that have been concluded between large digital market players and generative AI developers and providers. The European Commission is investigating the impact of these partnerships on market dynamics.

Finally, the European Commission is checking whether Microsoft's investment in OpenAI might be reviewable under the EU Merger Regulation.

Next steps

Interested parties are invited to submit their responses to the calls for contributions by 11 March 2024. The calls for contributions on virtual worlds and generative AI are available here. Interested parties may contribute to one of those two calls for contributions, or to both, as they wish.

Background

Generative AI systems and virtual worlds are disruptive technologies with great potential.

In addition to the enforcement of competition rules, the EU is already active in addressing the challenges posed by these new technologies: in July 2023, a Communication on Web 4.0 and virtual worlds was published, while in December 2023, the European Parliament and the Council reached a political agreement on the Commission's proposal for an AI Act: the first-ever comprehensive framework on Artificial Intelligence will ensure that AI is safe and respects fundamental rights, while fostering innovation.

Virtual worlds are persistent, immersive environments, based on technologies including 3D and extended reality (XR), which make it possible to blend physical and digital worlds in real-time, for a variety of purposes such as designing, making simulations, collaborating, learning, socialising, carrying out transactions or providing entertainment.

Generative AI systems are AI systems that generate, in response to a user prompt, synthetic audio, image, video or text content, for a wide range of possible uses, and which can be applied to many different tasks in various fields.

Venture capital investment in AI in the EU is estimated at more than €7.2 billion in 2023. The size of the virtual worlds market in Europe is estimated to have reached more than €11 billion in 2023. Both technologies are expected to grow exponentially in the next years and are likely to have a major impact on how businesses compete.

Effective enforcement of EU competition rules is essential to maintain competition in the EU's Single Market, which is Europe's best asset in terms of creating jobs and economic growth. These calls for contributions follow other calls carried out in recent years regarding the application of EU competition rules in various contexts.

For more information

See also the dedicated webpage of DG Competition, which contains the calls for contributions. Non-

confidential versions of the contributions will be published on this webpage.

IP/24/85

Quotes:

"Virtual worlds and generative AI are rapidly developing. It is fundamental that these new markets stay competitive, and that nothing stands in the way of businesses growing and providing the best and most innovative products to consumers. We are inviting businesses and experts to tell us about any competition issues that they may perceive in these industries, whilst also closely monitoring AI partnerships to ensure they do not unduly distort market dynamics."
Margrethe Vestager, Executive Vice-President in charge of competition policy - 09/01/2024

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

FTC Launches Inquiry into Generative AI Investments and Partnerships

Agency Issues 6(b) Orders to Alphabet, Inc., Amazon.com, Inc., Anthropic PBC, Microsoft Corp., and OpenAI, Inc.

January 25, 2024

Tags: Competition | R&D | Technology | Artificial Intelligence | Office of Technology

The Federal Trade Commission announced today that it issued orders to five companies requiring them to provide information regarding recent investments and partnerships involving generative AI companies and major cloud service providers.

The agency's 6(b) inquiry will scrutinize corporate partnerships and investments with AI providers to build a better internal understanding of these relationships and their impact on the competitive landscape. The compulsory orders were sent to Alphabet, Inc., Amazon.com, Inc., Anthropic PBC, Microsoft Corp., and OpenAI, Inc.

"History shows that new technologies can create new markets and healthy competition. As companies race to develop and monetize AI, we must guard against tactics that foreclose this opportunity, "said FTC Chair Lina M. Khan. "Our study will shed light on whether investments and partnerships pursued by dominant companies risk distorting innovation and undermining fair competition."

The FTC issued its orders under Section 6(b) of the FTC Act, which authorizes the Commission to conduct studies that allow enforcers to gain a deeper understanding of market trends and business practices. Findings stemming from such orders can help inform future Commission actions.

Companies are deploying a range of strategies in developing and using AI, including pursuing partnerships and direct investments with AI developers to get access to key technologies and inputs needed for AI development. The orders issued today were sent to companies involved in three separate multi-billion-dollar investments: Microsoft and OpenAI, Amazon and Anthropic, and Google and Anthropic. The FTC's inquiry will help the agency deepen enforcers understanding of the investments and partnerships formed between generative AI develc and cloud service providers.

The FTC is seeking information specifically related to:

> Information regarding a specific investment or partnership, including agreements and the strategic rationale of an investment/partnership.
>
> The practical implications of a specific partnership or investment, including decisions around new product releases, governance or oversight rights, and the topic of regular meetings.
>
> Analysis of the transactions' competitive impact, including information related to market share, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets.
>
> Competition for AI inputs and resources, including the competitive dynamics regarding key products and services needed for generative AI.
>
> Information provided to any other government entity, including foreign government entities, in connection with any investigation, request for information, or other inquiry related to these topics.

The companies will have 45 days from the date they receive the order to respond.

The Commission voted 3-0 to issue the Section 6(b) orders and conduct the study of AI investments and partnerships.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

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Networking

Cloud switching just got easier: Removing data transfer fees when moving off Google Cloud

January 11, 2024

Amit Zavery
GM/VP, Head of Platform, Google Cloud

At Google Cloud, we work to support a thriving cloud ecosystem that is open, secure, and interoperable. When customers' business needs evolve, the cloud should be flexible enough to accommodate those changes.

Starting today, Google Cloud customers who wish to stop using Google Cloud and migrate their data to another cloud provider and/or on premises, can take advantage of free network data transfer to migrate their data out of Google Cloud. This applies to all customers globally. You can learn more here.

Eliminating data transfer fees for switching cloud providers will make it easier for customers to change their cloud provider; however, it does not solve the fundamental issue that prevents many customers from working with their preferred cloud provider in the first place: restrictive and unfair licensing practices.

Certain legacy providers leverage their on-premises software monopolies to create cloud monopolies, using restrictive licensing practices that lock in customers and warp competition.

The complex web of licensing restrictions includes picking and choosing who their customers can work with and how; charging 5x the cost if customers decide to use certain competitors' clouds; and limiting interoperability of must-have software with competitors' cloud infrastructure. These and other restrictions have no technical basis and may impose a 300% cost increase to customers. In contrast, the cost for customers to migrate data out of a cloud provider is minimal.

Making it easier for customers to move from one provider to another does little to improve choice if customers remain locked in with restrictive licenses. Customers should choose a cloud provider because it makes sense for their business, not because their legacy provider has locked them in with overly restrictive contracting terms or punitive licensing practices.

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The promise of the cloud is to allow businesses and governments to seamlessly scale their technology use. Today's announcement builds on the multiple measures in recent months to provide more value and improve data transfer for large and small organizations running workloads on Google Cloud.

We will continue to be vocal in our efforts to advocate on behalf of our cloud customers — many of whom raise concerns about legacy providers' licensing restrictions directly with us. Much more must be done to end the restrictive licensing practices that are the true barrier to customer choice and competition in the cloud market.

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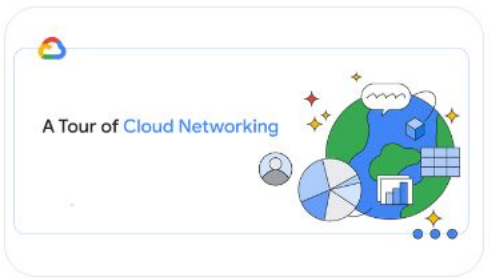

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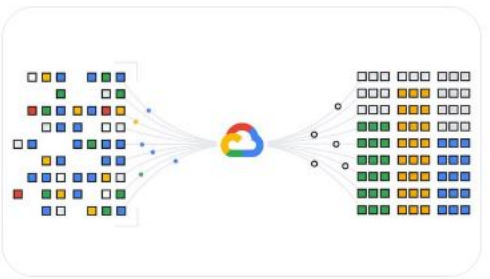

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