

# MARKET DEFINITION AND THREE 19A DESIGNATIONS UNDER GERMAN ANTITRUST LAW: ALPHABET, META, AND AMAZON



BY JENS-UWE FRANCK & MARTIN PEITZ<sup>1</sup>



<sup>1</sup> Jens-Uwe Franck is Professor of Private Law, Commercial Law and Competition Law at the University of Mannheim and a director of the Mannheim Center of Competition and Innovation—MaCCI. Martin Peitz is Professor of Economics at the University of Mannheim and a director of the Mannheim Centre for Competition and Innovation—MaCCI. He is a research fellow of CEPR and CESifo.

# CPI ANTITRUST CHRONICLE

## JANUARY 2023

### FRAGILE GIANTS: REASSESSING MARKET POWER IN PLATFORM ECOSYSTEMS

By Jonathan M. Barnett



### THE IMPACT OF ECONOMIC ANALYSIS ON MARKET DEFINITION IN THE CONTEXT OF DIGITAL PLATFORMS

By Nestor Duch-Brown & Wouter Vergote



### PLATFORM MARKET DEFINITION IN EU ANTITRUST LAW: THE CASE OF *ANDROID*

By Liliane Giardino-Karlinger & Rossitza Kotzeva



### HOW TO APPROACH THE CALCULATION OF OVERCHARGE BY MULTISIDED PLATFORMS

By Rosa M. Abrantes-Metz & Albert D. Metz



### COMPARE THE MARKETS: TWO-SIDED MARKET DEFINITION IN THE *COMPARETHEMARKET* CASE

By Andreea Antuca, Gunnar Niels & Helen Ralston-Smith



### MARKET DEFINITION AND THREE 19A DESIGNATIONS UNDER GERMAN ANTITRUST LAW: ALPHABET, META, AND AMAZON

By Jens-Uwe Franck & Martin Peitz



### A DEFINITION OF PLATFORMS WITH MEANINGFUL POLICY IMPLICATIONS

By Jørgen Veisdal



## MARKET DEFINITION AND THREE 19A DESIGNATIONS UNDER GERMAN ANTITRUST LAW: ALPHABET, META, AND AMAZON

By Jens-Uwe Franck & Martin Peitz

The Bundeskartellamt has designated Alphabet, Meta, and Amazon as 19a firms. Thus, they are potentially subject to specific competition law interventions under a special procedure. In these three designation decisions, market definition plays an important role. This article points to several noteworthy aspects that concern market definition. In all decisions the authority focuses on one national market, arguing that the respective platform operator is dominant. The authority's considerations are made at a somewhat aggregate level, abstracting from differences across market segments.

Visit [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com) for access to these articles and more!

CPI Antitrust Chronicle January 2023

[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)

## Scan to Stay Connected!

Scan or click here to sign up for CPI's **FREE** daily newsletter.



# I. INTRODUCTION

Section 19a of the German Competition Act<sup>2</sup> sits between traditional competition law and sector regulation.<sup>3</sup> Targeted at Big Tech, it aims to rebalance the power between the Bundeskartellamt on one side and designated large digital platforms on the other. In particular, the competition authority benefits from a reversal of the burden of proof regarding the anticompetitive nature of certain conduct by 19a firms. Interventions can, on the one hand, be more far-reaching than under the EU Digital Markets Act (“DMA”). On the other hand, however, 19a firms remain free to demonstrate that a certain conduct is “objectively justified.”

To intervene under section 19a the Bundeskartellamt must first designate an undertaking as a 19a firm. This requires two things: The undertaking has to be active “to a significant extent on markets within the meaning of section 18(3a)” and it has to be of “paramount significance for competition across markets” (section 19a(1)). Section 18(3a) provides guidance on the assessment of a platform’s market position by mentioning several features that deserve consideration. In assessing whether an undertaking is an addressee of section 19a, the legislator then provides the authority with a non-exhaustive list of five criteria that must be taken into account, including criteria 1, 3, and 5:

1. dominance on one or more markets,
3. vertical integration and activities on otherwise related markets,
5. gatekeeper position.<sup>4</sup>

Market definition plays an instrumental role for all three criteria.<sup>5</sup> We note that the designation process is not primarily driven by quantitative criteria, as in the DMA, but requires a detailed assessment of the business model of the designated platform operator, including the description of the markets in which it is active and its position in these markets. An identification of products and services and possible substitution possibilities appear to be essential in addressing the three criteria.<sup>6</sup>

Section 19a came into force at the beginning of 2021. Since then, the Bundeskartellamt has made three designation decisions (Alphabet,<sup>7</sup> Meta,<sup>8</sup> and Amazon<sup>9</sup>), which are effective for five years.<sup>10</sup> While Amazon has appealed the decision,<sup>11</sup> Alphabet<sup>12</sup> and Meta have come to terms with their 19a designation, which surprised some observers in the case of Meta, as the firm had until then been notorious in Germany for

---

2 Gesetz gegen Wettbewerbsbeschränkungen (GWB).

3 For a short guide to section 19a, see Franck J-U & M Peitz, Digital Platforms and the New 19a Tool in the German Competition Act, *Journal of European Competition Law & Practice* 12, 513–52 (“Franck and Peitz (2021a)”). See also Franck J-U & M Peitz, Section 19a of the Reformed German Competition Act: A (Too) Powerful Weapon to Tame Big Tech? *CPI Antitrust Chronicle* March 2021.

4 Competition Act, section 19a(1), 2nd sentence, no. 5 (“the importance of its activities for third parties’ access to supply and sales markets and its related influence on third parties’ business activities”).

5 Franck & Peitz (2021a), p. 517).

6 Market definition and market power are connected. In the context of digital platforms Franck & Peitz (2021b) elaborate on the former and Franck & Peitz (2023) on the latter. Franck J-U & M Peitz, Market Definition in the Platform Economy, *Cambridge Yearbook of European Legal Studies* 23, 91–127 (“Franck & Peitz (2021b)”) and Franck J-U & M Peitz, Market Power of Digital Platforms, *Oxford Review of Economic Policy*, forthcoming 2023 (“Franck & Peitz (2023)”). Preprint available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4205570](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205570).

7 Bundeskartellamt, December 30, 2021, B7 – 61/21 (“Alphabet 19a designation decision”). In the following we will quote from the translation of the decision that has been made available by Alphabet and published on the Bundeskartellamt’s website.

8 Bundeskartellamt, May 2, 2022, B6 – 27/21 (“Meta 19a designation decision”). In the following we will quote from the “convenience translation” published by the Bundeskartellamt based on a translation that has been made available by Meta.

9 Bundeskartellamt, July 5, 2022, B2 – 55/21 (“Amazon 19a designation decision”). In the following we will quote from the “convenience translation” published by the Bundeskartellamt based on a translation that has been made available by Amazon.

10 Section 19a(1), 1st and 2nd sentences of the Competition Act.

11 Bundeskartellamt, Press Release of November 14, 2022 (“Extension of ongoing proceedings against Amazon to also include an examination pursuant to Section 19a of the German Competition Act (GWB)”).

12 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 46.

exhausting all available avenues of appeal. The Amazon decision will now be reviewed by the Bundesgerichtshof, the German Federal Court of Justice, acting as court of first and last instance.<sup>13</sup> A designation procedure regarding Apple is still pending.<sup>14</sup>

While the outcomes of the designation procedures against Alphabet, Meta, and Amazon are hardly surprising, the Bundeskartellamt provides a detailed reasoning, which sheds light on how it deals with market definition in the context of section 19a. The following questions may arise: How does the authority apply the concept of market definition? Can indications perhaps be gleaned from the Bundeskartellamt's remarks, reasoning, and focus as to which conduct might be considered particularly relevant in future investigations? In this short contribution, we do not aim to answer those questions fully. Instead, we highlight and critically discuss several noteworthy aspects in the Bundeskartellamt's designation decisions with respect to market definition.

## II. THE DESIGNATION DECISIONS: ALPHABET (GOOGLE), META (FACEBOOK), AND AMAZON

### A. Alphabet (Google)

Alphabet is active in several areas, all of which fall under section 18(3a). In its designation decision the Bundeskartellamt lists and discusses Google Search, YouTube, Android and its App Store, and Chrome.<sup>15</sup> Relatively little consideration has been dedicated to Google's virtual assistant and its map service. The latter is particularly surprising given the authority's ongoing 19a investigation into Google Maps, examining possible anticompetitive restrictions to the detriment of other map services providers.<sup>16</sup>

In its decision, the Bundeskartellamt ultimately commits itself to only one definition of a market, namely the German market for general search services *vis-à-vis* search users, dominated by Google.<sup>17</sup> Thus, for the first time the authority has clarified that specialized search engines must not be included in this market. It asserts that general search services may address a particular information demand "which can in principle extend to the entire internet" and which cannot be met by a specialized search engine.<sup>18</sup> In contrast, the latter's users typically have an interest in a specific topic (flights, hotels, price comparisons, etc.), which may not be served in the same way by a general search service as it does not offer to limit a query by means of topic-related filters.<sup>19</sup>

Moreover, the Bundeskartellamt assumes that trading platforms such as Amazon Marketplace, which the authority regards as a particular case of a specialized search engine, are not part of the market because users typically only search for products on those platforms when they have already formed an intention to buy.<sup>20</sup> While this seems a plausible hypothesis, on the one hand, it begs the question of how often products are ultimately purchased on a trading platform for which the user had not originally searched. The design of the Amazon affiliate program indicates that the platform considers such purchases to be significant: commissions are paid not only if an advertised product is purchased via an affiliate link but also if a customer is directed to Amazon and purchases a non-advertised product within a certain period ("indirect sales"). On the other hand, sellers may use Google Ads to become visible precisely to those users of the search service that look for information with a clear intention of buying. From the seller's point of view, therefore, the intermediation services offered by Google and Amazon appear to be more interchangeable than the Bundeskartellamt suggests.

Furthermore, the authority puts emphasis on the fact that the respective business models differ: While general search services are almost exclusively financed via search-based advertising, specialized search engines monetize search results through compensation agreements (typically success-based) with content providers.<sup>21</sup> One thing to note here is that there appears to be an increasing tendency among platform

13 On the abridged judicial review in 19a cases see Franck and Peitz (2021a, p. 525).

14 Bundeskartellamt, Press Release of June 21, 2021 ("Proceeding against Apple based on new rules for large digital companies (section 19a(1) GWB) – Bundeskartellamt examines Apple's significance for competition across markets").

15 See, for example, the authority's explanations given as to Google's dominant position in the German market for general search services and its "strong market position/power regarding other activities," Bundeskartellamt, Alphabet 19a designation decision (n 7) paras 230–323.

16 Bundeskartellamt, Press Release of June 21, 2022 ("Proceeding against Google for possible anti-competitive restrictions of map services (Google Maps Platform)").

17 Bundeskartellamt, Alphabet 19a designation decision (n 7) paras 62, 86, 230, 234–262.

18 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 249.

19 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 250.

20 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 251.

21 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 253.

operators such as Amazon Marketplace and Booking.com to rely on financing through advertising. Most importantly, however, the authority leaves the reader in the dark about the significance that different monetization is supposed to have for demand substitutability and thus for defining the market.

Finally, the authority suggests that, in the market for general search services, there is no need to differentiate between desktop and mobile search because it appears that the same operators offer the same services with only slight variations in presentation. In view of Google's dominant position in each segment, however, the authority could leave this open.<sup>22</sup>

Without ultimately adopting this position, the Bundeskartellamt points out that other competition authorities, above all the Commission in *Google Search (AdSense)* (2019) and in *Google/Fitbit* (2020), have defined a market for search-based advertising, dominated by Google.<sup>23</sup> Note the authority's observation that trading platforms such as Amazon Marketplace or providers of display advertising could not be regarded as direct competitors as they pursue a different business model.<sup>24</sup> In addition, the authority emphasized that, from advertisers' perspective, advertising via Amazon could only be considered interchangeable with advertising services provided through Google Search in a subsegment of product sales.<sup>25</sup>

## **B. Meta (Facebook)**

The Bundeskartellamt identifies Facebook, Instagram, and WhatsApp as the most important platforms operated by Meta. It observes that Facebook caters to various user groups:

Facebook social network offering ... is primarily aimed at private users and content providers ("publishers"). In addition, the platform also includes the Facebook developer platform ("Meta for Developers"), which can be used by third-party companies to develop their services via the "Facebook Business Tools" and other software products and programming interfaces, among other things.<sup>26</sup>

The Bundeskartellamt set out in detail these and other offerings, including services provided to advertisers. It observes that,

based on its service description, Meta offers intermediary services with the ad-financed social network Facebook as well as with the ad-financed photo and video network Instagram, which are a combination of a network and a multi-sided market.<sup>27</sup>

While the wording is somewhat unfortunate (an undertaking operates on a "market" but is not a "market," at any rate not in the sense of antitrust law), we can interpret that Facebook and Instagram are multisided platforms (which include a social network leading to network effect between consumers), as there are cross-group network effects between various user groups.

The Bundeskartellamt then narrows down the relevant user groups:

The relevant user groups of the services are, in essence, private users who use Facebook and Instagram without monetary consideration on the one hand, and, on the other hand, the group of advertisers who, in return for payment, use the services to place targeted adverts based on user data there.<sup>28</sup>

Hand-in-hand with the identification of various user groups, the Bundeskartellamt identifies separate markets for intermediation services supplied to (1) advertisers, (2) content providers, (3) developers, and (4) private users.<sup>29</sup> Thus, the authority adopts a multi-markets ap-

---

22 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 258.

23 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 310.

24 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 316.

25 Bundeskartellamt, Alphabet 19a designation decision (n 7) para 316.

26 Bundeskartellamt, Meta 19a designation decision (n 8) para 11.

27 Bundeskartellamt, Meta 19a designation decision (n 8) para 86.

28 Bundeskartellamt, Meta 19a designation decision (n 8) para 87.

29 Bundeskartellamt, Meta 19a designation decision (n 8) paras 127–132.

proach,<sup>30</sup> while at the same time describing this as an exception to the general assumption that activities of two-sided (matching) platforms can also be adequately captured through a single-market approach.<sup>31</sup>

There is arguably one additional important user group that has not been separately identified and appreciated. This group consists of individual users behaving as influencers—their *raison d'être* is to engage a large number of consumers and to make money from contracts with brand manufacturers; they do not engage with a group of friends and family, as end users do. The success and contestability of a social network arguably also depend on the influencer side and constitute a separate market that was not considered in the designation decision. To the extent that influencers are subsumed into the group of content providers, the Bundeskartellamt acknowledges their presence and points to the interdependence between consumers and content provider decisions.<sup>32</sup>

In a future analysis of Facebook as a multisided platform, the Bundeskartellamt could evaluate the extent to which Facebook/Instagram is a gatekeeper for consumers' attention for entertainment and social media content (and to what extent it is competing with streaming platforms such as YouTube). The authority could assess lock-in effects on the influencer side (as well as content and product providers) on Facebook/Instagram and the extent of multihoming by influencers and other user groups to understand whether there is a separate market on the Facebook/Instagram platform or whether good substitutes exist on other platforms.

With respect to WhatsApp, the Bundeskartellamt notes that it

is in functional terms still largely operated separately from Facebook and Instagram, but is nevertheless an essential part of the Meta ecosystem focused on social media and can also be regarded as indirectly monetized via advertising on Facebook and Instagram.<sup>33</sup>

WhatsApp, Facebook Messenger, and offers by other companies such as Viber are characterized as messenger services and (alongside video conferencing services) separated from the social network market.<sup>34</sup> While not explicitly defined in the decision, a market for messenger services appears to have been implicitly assumed.<sup>35</sup> Considering the various connected activities of Meta, the Bundeskartellamt concludes that:

Meta operates a strong, data-driven ecosystem in the entire sector of ad-financed social media, which due to strong lock-in effects on private and business users poses the risk of competition mostly existing only in certain specific areas and competitors being permanently pushed to the fringes of the ecosystem ... As a result, Meta's ecosystem holds a position which extends across various markets with blurred market boundaries and which is difficult or impossible for other companies to challenge.<sup>36</sup>

While the Bundeskartellamt looks beyond individual markets, it returns to the market of social network services for end users and social media advertising for advertisers as the markets of main concern:

With its core service Facebook, Meta holds a dominant position on the national platform and network market for social networks for private users; in the area of social media advertising, the company is at least very strong.<sup>37</sup>

The finding of Facebook's dominant position in a market for social network services provided to private users must be seen as a cornerstone to establish the 19a status of Meta.<sup>38</sup> The assessment of dominance relies on a market definition that emphasized the supposedly unique functionalities of Facebook. For example, the Bundeskartellamt states that,

---

30 Bundeskartellamt, Meta 19a designation decision (n 8) para 129.

31 Bundeskartellamt, Meta 19a designation decision (n 8) para 129.

32 Bundeskartellamt, Meta 19a designation decision (n 8) paras 94–96 and 131.

33 Bundeskartellamt, Meta 19a designation decision (n 8) para 105.

34 Bundeskartellamt, Meta 19a designation decision (n 8) para 150.

35 See Bundeskartellamt, Meta 19a designation decision (n 8) paras 344–358.

36 Bundeskartellamt, Meta 19a designation decision (n 8) para 114; see also para 668.

37 Bundeskartellamt, Meta 19a designation decision (n 8) para 117.

38 Bundeskartellamt, Meta 19a designation decision (n 8) para 126.

although TikTok belongs to the social media area in the broader sense, it is primarily a content-sharing platform with a strong focus on videos and therefore, like YouTube or the similarly classified service Snapchat, cannot be assigned to the social network market despite partial overlaps.<sup>39</sup>

At this point, the authority does not rely on empirically verified demand substitutability but on the attempt to put offers into different pigeonholes on the basis of objective product features: Only items in the same pigeonhole belong to the same market. The fact that Facebook has apparently rapidly lost users in certain demographic groups<sup>40</sup> is not considered as evidence of relevant substitution effects at work. Unfortunately, such an approach bears the risk of rendering market definition an activity that may be remote from reality. Instead, an empirical assessment of substitution patterns over time in different demographic user groups can lead to a more informed assessment of actual market boundaries. Arguably, if such a more in-depth analysis of substitution patterns is performed, the destination exercise may become too cumbersome.

Finally, it is noteworthy that the Bundeskartellamt explains in detail that, according to the results of its investigation, a separate national market for social media advertising should be defined (on which Meta, with its advertising products on Facebook and Instagram, had to be considered dominant<sup>41</sup>). However, it ultimately leaves this point open.<sup>42</sup> Excluded from this market would be search-based advertising (Google),<sup>43</sup> traditional display and banner advertising,<sup>44</sup> and instream video advertising (YouTube, Twitch).<sup>45</sup> The authority commits itself to the first aspect but leaves the latter two aspects open. To demonstrate a specific demand for social media advertisement and, thus, to substantiate this narrow market definition, the authority mainly relies on a survey of 29 media agencies and of 15 of Meta's competitors in social media.<sup>46</sup>

### **C. Amazon**

Amazon provides a retail environment in which it provides consumers with the possibility to search for physical and digital products and to purchase the selected product, which may be Amazon's own brand, a different brand provided by the brand manufacturer itself, a different brand sold through Amazon retail, a different brand sold by a third-party seller who contracts Amazon's logistics services (Fulfilled by Amazon, FBA), or a different brand sold by a non-FBA seller (to be precise, a third-party seller may decide to use FBA not for all but part of the product portfolio that it sells).

The Bundeskartellamt provides a detailed reasoning for defining a national market for the provision of online marketplace services for professional (third-party) sellers,<sup>47</sup> which is dominated by Amazon.<sup>48</sup>

the Amazon marketplace is to be assigned as a separate market for the provision of online marketplace services for professional sellers, at least with regard to the market side of third-party sellers.<sup>49</sup>

While the authority thus adopts a multi-markets approach, it states elsewhere, en passant, that it considers a single-market approach, in general, to be equally adequate for the analysis of so-called matching platforms such as Amazon Marketplace. According to the authority, this might be different in this case as Amazon has integrated its retail business and its marketplace, which could be seen as evidence that the different user groups had different views on the functional interchangeability of the intermediary service provided by the platform.<sup>50</sup> In contrast to this view, as discussed in detail elsewhere, we believe that competition authorities would be well advised to consistently use a multi-markets

---

39 Bundeskartellamt, Meta 19a designation decision (n 8) para 155.

40 See Bundeskartellamt, Meta 19a designation decision (n 8) paras 195 ("TikTok serves a different age group than Facebook") and 334.

41 Bundeskartellamt, Meta 19a designation decision (n 8) para 277.

42 Bundeskartellamt, Meta 19a designation decision (n 8) para 211–276.

43 Bundeskartellamt, Meta 19a designation decision (n 8) para 243–252.

44 Bundeskartellamt, Meta 19a designation decision (n 8) para 253–265.

45 Bundeskartellamt, Meta 19a designation decision (n 8) para 266–274.

46 Bundeskartellamt, Meta 19a designation decision (n 8) para 220,

47 Bundeskartellamt, Amazon 19a designation decision (n 9) paras 92–173.

48 Bundeskartellamt, Amazon 19a designation decision (n 9) paras 174–261.

49 Bundeskartellamt, Amazon 19a designation decision (n 9) para 94.

50 Bundeskartellamt, Amazon 19a designation decision (n 9) para 107.

approach in defining markets in the context of platforms that mediate transactions between two user groups.<sup>51</sup> Indeed, it is a priori unclear to us how a single-market approach could have been made operational in the present case.

One particular item in need of further discussion is the analysis of Amazon in relation to social media platforms. The Bundeskartellamt notes:

The purchasing options currently available in Germany via social media . . . do not allow a purchase to be concluded directly on the platform, but require the seller to have an external online shop in which the purchase is concluded. It is therefore . . . not a sale via a social media platform. Just like the use of product and price comparison sites or paid advertising, the use of stores on Facebook or Instagram thus represents sales promotion measures aimed at increasing sales via the undertaking's own online shop . . . In this respect, the services offered by Meta . . . differ significantly from the services offered by online marketplace operators. Functional substitutability is therefore ruled out from the perspective of the sellers for this reason alone.<sup>52</sup>

The market definition here may have somewhat hastily followed the motto “what looks different needs to be separated.” After all, considering the availability of software solutions such as Shopify (which offers an integrated suite including payment and logistics), even small sellers can easily run online shops. For this reason alone, it seems surprising that substitution possibilities based on social media marketing are ruled out so quickly. Furthermore, the statement above also seems inconsistent with the findings in the 19a decision on Meta, where it says:

Via the “Shops” section of Instagram and Facebook, it is increasingly possible to find out more about the products in question directly on Instagram and Facebook and, depending on how the offer is designed, *to purchase them directly*. Facebook Pay can – as far as it is already available – also be used as a means of payment, which further shortens the path from (first) noticing a certain product to purchasing it.<sup>53</sup>

Certainly, the way of contacting potential customers differs. Social media can reach different customer groups or stimulate different purchases (“impulse purchases”) than Amazon's marketplace. Nevertheless, there may be greater potential for demand substitutability here than suggested by the authority. Given the overall importance of Amazon as a matchmaker, this would, in all likelihood, not have affected the outcome of the designation decision but may matter for subsequent analyses and decisions.<sup>54</sup>

It is noteworthy that the Bundeskartellamt recognizes that demand substitutability differs for the type of third-party retailer considered. It points out that several alternatives to Amazon Marketplace in Germany operate as closed platforms and many third-party sellers active on Amazon would not qualify as sellers on those closed platforms.<sup>55</sup> Substitution possibilities depend on the type of product category.<sup>56</sup> For example, in the product categories of clothing and accessories, Zalando is an important competitor on the consumer side. Like Amazon, Zalando operates in a dual mode and runs its partner program for third-party sellers. The fact that the Bundeskartellamt nonetheless does not take a more granular approach may be defended on the ground that the outcome of the designation decision would ultimately not be affected given the generally strong position of Amazon in e-commerce overall. However, the evaluation of the contestability of Amazon's market position (as well as potential remedies if it comes to that in the future) should take this into account.

### III. TAKEAWAYS

**Defining one (dominated) market.** A pattern emerges from the three 19a decisions. In each case, the Bundeskartellamt defines precisely one (national) market and establishes the dominance of the respective platform operator: Google (Alphabet) dominates the market for general search

---

51 Franck & Peitz (2021b), pp 102–108).

52 Bundeskartellamt, Amazon 19a designation decision (n 9) para 147. See also para 120, where the use of social media platforms is characterized as a mere input for the operation of a seller's own online shop.

53 Bundeskartellamt, Meta 19a designation decision (n 8) para 333 (emphasis added).

54 The Bundeskartellamt seems to assume the opposite. See Amazon 19a designation decision (n 9) para 127 (“for sellers, the online marketplace services offered to them by marketplace operators cannot be substituted by sales via their own online shop, or at best only to a very limited extent”). To strengthen their claim, the Bundeskartellamt compares visitor numbers to digital marketplaces with large online shops (paras 128–129). However, this assessment appears to be incomplete as there may be a long tail for online shops. As a side remark, policy interventions in the market for targeted advertising are likely to affect substitution possibility.

55 Bundeskartellamt, Amazon 19a designation decision (n 9) para 250.

56 Bundeskartellamt, Amazon 19a designation decision (n 9) para 251.



services *vis-à-vis* search users; Facebook (Meta) the market for social network services provided to private users; Amazon the market for the provision of online marketplace services to professional (third-party) sellers. Although market dominance is not a prerequisite for 19a addressee status,<sup>57</sup> it is a very important factor in this respect. Consequently, the underlying market definition in each case is also essential for the three designation decisions. The finding of market dominance in all cases serves as an anchor for further considerations by which the authority demonstrates the platform operator’s “paramount significance for competition across markets.”

**Advertising markets.** In other respects, the competition authority avoids committing itself to certain market definitions. At any rate, it reveals a clear tendency to define separate markets for search-based advertising (dominated by Google) and for social media advertising (dominated by Meta via Facebook and Instagram).

**Multi-markets approach.** All three market definitions that were essential for the designation decisions are based on a multi-markets approach.<sup>58</sup> The Bundeskartellamt defines the intermediation service of the respective platform *vis-à-vis* one (of several) user groups as a separate market. In Facebook and Amazon, however, the competition authority argued, in line with its view, now established for several years, that this is only to be understood as an exceptional case, deviating from a general assumption that a single-market approach may be adequate for defining markets in the case of two-sided (matching) platforms.

**Granularity.** The Bundeskartellamt defines the relevant products and services offered by the respective digital platform and the associated user groups broadly. For example, in *Amazon*, the authority decided not to follow a more granular approach and to differentiate substitution possibilities depending on the type of product category but to address sellers’ substitution possibilities in generic terms. Defining markets at a more granular level would lead to the distinction of markets by product category, which may matter for the subsequent analysis of market power. In the example of Amazon, sellers active in clothing and footwear can use the Zalando marketplace as an alternative. Since Zalando is not active in most other product categories, the assessment of substitutable offers—and, thus, the assessment of Amazon’s market power—differs across product categories. Relatedly, in its designation decision about Meta, the Bundeskartellamt did not distinguish between different demographic user groups (however, it does not completely ignore this, e.g. when discussing Snapchat or TikTok).

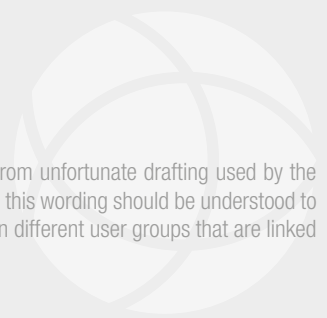
**Methodology.** On questions of market definition, the Bundeskartellamt takes account of the findings of other competition authorities, in particular the European Commission, as well as of adjudication in cases involving the respective platforms. The authority bases its own findings about demand substitutability in part on surveys among competitors and other relevant market operators. Further, it emphasizes that “the members of the [chamber deciding the case] who belong to the relevant group of customers can also reach the necessary conclusions themselves on the basis of their own life experience.”<sup>59</sup> At some points, the authority’s reasoning reads as if demand substitutability was not actually investigated as an empirical phenomenon but rather derived from objectively divergent product features or from divergent business (monetization) strategies. We see here the risk that the Bundeskartellamt is following an easy — but problematic — road, excluding too hastily intermediation services from the market that on closer inspection might turn out effective substitutes (see, for example, the exclusion of vertical search from the general search market or the exclusion of e-commerce activities outside e-commerce marketplaces).

---

57 Franck & Peitz (2021a, p. 517).

58 The decisions mention at various points that the respective platforms operate on or as “multi-sided markets.” This rhetoric stems from unfortunate drafting used by the legislature in section 18(3a) of the Competition Act. Multisidedness is a feature at the firm and not (necessarily) the market level. Therefore, this wording should be understood to mean that the relevant undertaking may qualify as a 19a firm because it operates a multisided platform, acting as an intermediary between different user groups that are linked through cross-group network effects. See Franck & Peitz (2021a, p. 515).

59 Bundeskartellamt, Meta 19a designation decision (n 8) para 145.



## CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit [competitionpolicyinternational.com](http://competitionpolicyinternational.com) today to see our available plans and join CPI's global community of antitrust experts.

