Introduction and General Observations

1. Since its inception as an online retailer in 1995, Amazon has been relentlessly focused on being the Earth’s most customer-centric company, where people can find and discover anything they want to buy online. In achieving this goal, we are guided by four principles: customer obsession, passion for invention, commitment to operational excellence, and long-term thinking.

2. Providing a high-quality, reliable and trusted online sales environment has been crucial to Amazon’s success in meeting the demands of its customers. Ensuring such an environment day-in, day-out is critical, not only for persuading consumers to shop with Amazon but also for demonstrating to manufacturers that offering their products on Amazon protects, and even enhances, the value of their brands. Amazon shows that online retail can be a high quality experience, in which brands are protected and presented in a manner that is equivalent to the protection and presentation enjoyed in the offline world, while at the same time offering consumers a vastly enhanced choice and convenience. Amazon is far from unique in this respect. Indeed, even the most high-end luxury brands are now sold online, on brands’ own websites, retailers’ websites and marketplaces.

3. Unfortunately, some manufacturers and brand owners nevertheless persist in discriminating against online retail as a sales method, without objective justification. Many refuse to engage at all with online retailers, apply selective distribution in an excessive and inappropriate manner, exclude online retailers from their networks or impose disproportionate and unjustified restrictions on their resellers that prevent them from taking advantage of the benefits offered by e-commerce. The end result is that
products are either not available online at all or are available only to a very limited extent, meaning that consumers lose out.

4. Amazon therefore welcomed the Commission’s decision to undertake an inquiry into the e-commerce sector. We note from the Preliminary Report that the sector inquiry appears to have borne out Amazon’s concerns that the rise of e-commerce has directly led to a considerable increase in the number and variety of products sold using selective distribution, threatening the consumer benefits of e-commerce. [Confidential Information]

5. Amazon also urges the Commission to address now weaknesses in the Vertical Guidelines, which have arguably contributed to the abuse of selective distribution by brands. In particular, brands have exploited ambiguities in the wording of paragraph 54 of the Vertical Guidelines to impose ‘brick and mortar’ requirements and absolute bans on the use of marketplaces, irrespective of the nature of their products or the quality of the online sales environment offered by a retailer seeking access or the marketplace on which an authorised reseller wishes to sell the brand’s products.

6. This ambiguity should be addressed as a matter of urgency to clarify that the imposition of a brick and mortar requirement that is not justified by the nature of the product or other objective consideration is viewed by the Commission as an unjustified restriction of passive sales and thus a hardcore restriction of competition. The same approach should be taken to absolute bans on the use of marketplaces by authorised resellers and to other common restrictions which, whether individually or in combination, have a similar effect to online sales bans, including bans on the use of price comparison sites or online search advertising to attract customers. Such restrictions, which can effectively make a retailer’s offering invisible to potential customers, have no equivalent in the offline sales environment and cannot be justified by reference to differences in distribution method.

7. Such restrictions should be assessed particularly critically in the mobile commerce segment, which is the most important growth segment of online trading and already consumers’ preferred shopping segment.
8. Amazon submits that the cumulative effect of such practices justifies their classification as hardcore restrictions of competition, under Articles 4(b) and/or (c) of the Vertical Agreements Block Exemption Regulation (VBER). To the extent that there is any uncertainty over this, we would suggest that this can be addressed through immediate revision of the Vertical Guidelines.

9. If the Commission considers that the current wording of the VBER does not permit such an interpretation, this would indicate a material inadequacy in the regulation that should also be addressed now, rather than waiting until 2022.

10. We would like to provide the following, additional comments on specific aspects of the Preliminary Report.

The Commission’s general considerations on selective distribution and the physical store requirement (Preliminary Report, para 198 et seqq.)

11. Amazon notes the Commission’s preliminary findings that the use of selective distribution systems has significantly increased with the growth of e-commerce (para. 223) and that the adoption of selective distribution or the introduction of new criteria has often arisen as a specific response to that growth and the greater competition that e-commerce offers consumers (para. 199-200). Amazon agrees with the view of the Commission that the use of certain clauses in selective distribution agreements requires closer scrutiny (para. 228), as does the manner in which selection criteria are applied by manufacturers (para. 229-230).

12. [Confidential Information]

13. Amazon notes the Commission’s observation (at para. 220 of the Preliminary Report) that “47% of the manufacturers using selective distribution reported that they do not accept pure online players to their selective distribution network”. We find it implausible that a brick and mortar requirement could be objectively justified in such a large proportion of cases, particularly in a retail environment in which customers are

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willing to purchase even high-value and complex products online. [Confidential Information]

14. As the Commission notes at para. 231 of the Preliminary Report, many manufacturers either refuse to communicate selective distribution criteria to any retailer wishing to be admitted to their networks or reserve such treatment for pure play internet retailers, using the brick and mortar requirement as an easy to apply pretext, without any attempt to justify objectively [Confidential Information]. This cannot be acceptable, in light of the clear potential for competition to be restricted as a result.²

15. Amazon is concerned that manufacturers have been able to exploit shortcomings in the current Vertical Guidelines to justify such overly-restrictive selective distribution policies without (in their minds) raising concerns under Article 101 TFEU. Amazon is particularly concerned by the tendency of manufacturers to treat the wording in para. 54 of the Vertical Guidelines noting that a “supplier may ... require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system” as justification for a carte blanche exclusion of ‘pure play’ online retailers from their selective distribution networks, irrespective of the product and without any further justification being required.

16. With this in mind, Amazon welcomes the Commission’s clarification that such an absolute conclusion is not justified, as reflected in the following statement (para. 228 of the Preliminary Report): “For example, the requirement for retailers to operate at least one brick and mortar shop (thereby excluding all pure players from selective distribution), while generally covered by the Vertical Block Exemption Regulation, may need further assessment in individual cases when used for certain product categories or certain lines of products which pure online retailers might be equally qualified to sell”.

17. We would nevertheless suggest that the Commission be more explicit on the need to reinterpret and/or update paragraph 54 of the Vertical Guidelines, to make it clear

² See, on this point, Case 107/82 AEG v Commission, judgment of 25 October 1983, in which the Court noted that, in the absence of a clear pro-competitive justification for selective distribution, its “sole effect would be to reduce price competition” and thus maintain unjustifiably high prices (at paragraph 34).
beyond doubt that there can be no general assumption of the lawfulness of a brick and mortar requirement. Indeed, in particular because it is hard to see how a brick and mortar requirement can ever be objectively justified in the contemporary retail environment, we would urge the Commission to go further to protect competition and to take the approach that the use of such requirements amounts to a hardcore restriction of online retail that is presumptively unlawful and therefore outside the VBER.

The Commission’s findings and conclusions regarding marketplace restrictions (para. 408 et seqq.)

18. Amazon agrees with the retailers and marketplaces cited in the Preliminary Report that the main reason for manufacturers introducing marketplace restrictions is their desire to reduce the number of sellers selling online and thereby to avoid the increased price transparency and increased price competition offered by the internet (para. 454).

19. Amazon has always strongly rejected, and always will strongly reject, any attempts by its suppliers to engage it in anticompetitive conduct, whether by influencing retail pricing on Amazon or otherwise. [Confidential Information]

20. In this context, Amazon considers that the Commission’s view, as noted in para 473 of the Preliminary Report, that absolute marketplace bans may not be compatible with competition law, is a positive development.

21. Amazon also strongly agrees with the Commission’s observation at para. 474 of the Preliminary Report that a marketplace sales ban that is ostensibly based on brand protection considerations or a lack of pre- or post-sales service is particularly hard to justify in circumstances where a manufacturer has accepted the marketplace operator as an authorised seller or if the manufacturer is itself selling on the same marketplace.

22. Amazon is nevertheless concerned that the Commission appears to be prepared to maintain an overly permissive approach towards marketplace bans. In particular, we note with concern the Commission’s assessment in the Preliminary Report that marketplace bans “should not be considered hardcore restrictions within the meaning of Articles 4 (b) and 4 (c) of the Vertical Block Exemption Regulation” (para. 472).
23. Given the material harm that marketplace bans can cause to both retailers and consumers (*inter alia*, by reducing price transparency and price competition), we would like to elaborate on this point as follows:

- We do not share, and would like to better understand, the Commission’s presumption that, in order to be considered as having the object of restricting passive sales, marketplace bans would need to amount to a *total ban* of the use of the internet as a method of marketing (para. 468). As the Vertical Guidelines make clear, any provision that unduly limits a distributor’s access to customers through online sales, such as differential pricing, mandating a maximum proportion of total sales that may be made online, mandating geo-blocking (all para. 52 of the Vertical Guidelines) or applying criteria for online sales that are not overall equivalent to a supplier’s criteria for offline sales (para. 56 of the Vertical Guidelines), should be viewed as a hardcore restriction of competition.\(^3\)

- The logic that dictates that such discriminatory measures should be seen as hardcore passive sales restrictions applies equally to marketplace sales bans. Even if a member of a selective distribution network remains free to use other ways of selling online (e.g. by operating on own online shop), the imposition of a marketplace ban clearly has the potential to have the object of restricting that retailer’s ability to make passive sales, particularly when combined with other restrictions, such as bans on the use of price comparison sites or search advertising, that make online sales difficult or practically impossible (see also para. 26 below).

24. The Preliminary Report further states as follows (para. 469): “*the importance of marketplaces and, consequently, the impact of marketplace bans, vary significantly.*” While Amazon agrees that the importance of marketplaces varies depending on a range of factors, we do not see how this variation can support a general conclusion that marketplace bans should not be viewed as hardcore restrictions (para. 472).

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\(^3\) Amazon commends the logic of the approach taken by the German Federal Cartel Office (*FCO*) in this context, in particular in its recent *ASICS* decision (Ref. B2-98/11), in extending this treatment to the imposition of bans on the use of price comparison sites and the use of a supplier’s brand for search advertising, due to their equivalent effect.
25. Rather than using the existence of such differences to justify an overly permissive approach to marketplace bans [Confidential Information] the appropriate approach would be to start from a sceptical position concerning their legality, while allowing for individual analysis in specific cases. This point is developed further in the ‘Legal assessment’ section below.

26. As noted above, the combination of a marketplace ban with other restrictions limiting the ability of retailers to attract customers online, such as a prohibition of the use of price comparison sites or the use of search advertising, will exacerbate the restriction of competition, especially for small and medium-sized retailers, by rendering retailers practically invisible to customers.

**Legal assessment**

27. As noted above, the Commission takes the position in the Preliminary Report that differences in the importance of marketplace sales across territories, seller groups and product justifies a permissive approach to marketplace bans. We do not believe the law supports that conclusion. It is well established that the characterisation of a restriction as one that infringes Article 101 ‘by object’ depends upon its “economic and legal context”. As a result, rather than starting from the position that marketplace bans should not be viewed as hardcore restrictions, there is ample scope for the Commission to take into account the importance of marketplace sales in a specific case to establish whether, on the particular facts, such a ban should be viewed as a hardcore restriction of competition.

28. We would also like to comment on the assessment of the Commission that “the preliminary findings of the sector inquiry do not indicate that marketplace bans should be considered hardcore restrictions within the meaning of Article 4(b) and/or Article 4(c) of the Vertical Block Exemption Regulation. The Commission considers that such clauses do not have as their object (i) a restriction of the territory or the customers to whom the retailer in question may sell or (ii) the restriction of active or passive sales to end users” (para. 472).

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4 See, in particular, the judgment of the ECJ in Case C-67/13 Groupement des Cartes Bancaires v. Commission, para.53.
According to settled ECJ case law, the VBER (as other block exemptions) must be interpreted restrictively. This principle suggests that the hardcore restrictions set out in Article 4 of the VBER should not be interpreted overly narrowly, since to do so would unduly broaden the block exemption’s protective scope to include agreements that would be more appropriately subjected to an individual assessment under Article 101(3) (cf. ECJ judgment of October 13, 2011, C-439/09, para. 57 – Pierre Fabre).

In this light, we believe that the following assumption of the Commission requires critical analysis: “They [meaning: marketplace restrictions] concern the question of how the distributor can sell the products over the internet and do not have the object to restrict where or to whom distributors can sell the products.” We believe that this is not correct: First, a marketplace ban prohibits any and all passive selling to all marketplace users. The fact that the same customers are generally able to use other ways to purchase goods, whether “online” or “offline”, does not detract from this conclusion, as it is the specific context of the restriction that is decisive. After all, no group of people can be exclusively reached over one single distribution channel and it would be artificial to rule out defining a customer group by reference to one characteristic, simply because they also display other characteristics in other contexts.

We understand that any restriction of a retailer’s freedom to reach potential customers by online sales is sufficient to find a violation of Article 4(b) VBER. The fact that Article 4(b) VBER only mentions that sales to the customers in question must be “restricted” (i.e. that such sales freedom is restrained, thereby reducing potential sales), rather than completely prohibited, supports this finding.

In line with the above, also – and a fortiori – a hardcore restriction applies pursuant to Article 4(c) VBER as the “customer group” in question here – no matter its exact definition – in any case comprises “end customers”, as referred to in Article 4(c) VBER. Marketplace bans by definition restrict passive sales to end customers. Such bans therefore contradict one of the key principles of selective distribution, namely that

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See, for example, the references at para. 52 of the Vertical Guidelines to practices that have the “capability ... to limit the distributor’s access to a greater number and variety of customers” and at para. 56 to restrictions that “dissuade appointed dealers from using the internet to reach a greater number and variety of customers”. In each case, these are specifically classed as hardcore restrictions, notwithstanding the absence of an outright prohibition on internet sales. (See also para. 23 above.)
authorised dealers’ deliveries to *end customers* must not be restricted in any way. By preventing any marketplace sales to any end customers, irrespective of quality considerations, this principle is not complied with.

33. We also do not agree with the following statement of the Preliminary Report: “Such an approach [meaning: considering marketplace bans as not constituting a hardcore restriction under Article 4(b) or 4(c) VBER] is in line with the Vertical Guidelines which specify that marketplace restrictions requiring the retailer to use third party platforms (e.g. marketplaces) only in accordance with the quality criteria agreed between the manufacturer and its retailers for the retailer's use of the internet are not considered as hardcore restriction.”

34. This ignores the fact that *absolute* marketplace bans lack any reference to “quality criteria”. They are “absolute” in that they prohibit any sales on marketplaces, no matter which criteria the seller and/or marketplace may be able to fulfil. Amazon’s submission is that such policies amount to a hardcore restriction of competition precisely because they make no attempt to link this prohibition with any quality criteria.

35. This approach is supported by other provisions of the Vertical Guidelines, including the following language at paras 54 and 56:

*Para 54:* Under the block exemption the supplier may require quality standards for the use of the internet site to resell his goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general.

*Para 56:* Therefore, the Commission regards as a hardcore restriction any obligations which dissuade appointed dealers from using the internet to reach more and different customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop.

36. Again, in the case of absolute marketplace bans, there is no application of criteria for online sales (as referred to in para. 56 of the Vertical Guidelines) or quality standards (as referred to in para. 54 of the Vertical Guidelines) at all. On the basis that these are foreseen as an essential characteristic for selective distribution arrangements to be compatible with the VBER, we would suggest that the Vertical Guidelines themselves actually support treating absolute marketplace bans as a hardcore restriction in the meaning of Article 4 (b) and Article 4 (c) VBER.
37. Part of the problem here may be the wording of the final sentence of paragraph 54, which purports to illustrate the general principle set out in the penultimate sentence cited above by stating that “For instance, where the distributor’s website is hosted by a third party platform, the supplier may require that customers do not visit the distributor’s website through a site carrying the name or logo of the third party platform” (emphasis added). The meaning of this additional sentence is not clear. In the first place, references to “hosting” and “visiting a distributor’s website” are peculiar and do not reflect commercial reality, since third party marketplaces do not commonly “host” sellers’ websites but rather provide an opportunity for sellers to advertise their products on the marketplace site. Second, the sentence appears to go beyond the proposition in the preceding sentence that it is intended to illustrate, unless it can always be assumed that any sale on any third party platform will always and necessarily fail to meet any supplier’s standards and conditions for direct online sale. As well as being hard to maintain as a matter of logic, such an assumption would be contrary to the overall approach of the VBER and Vertical Guidelines, which views undue discrimination against online retail as a hardcore restriction of competition and hence unlawful.

38. We would suggest that manufacturers that currently seek to rely on paragraph 54 of the Vertical Guidelines to support absolute marketplace bans are wilfully exploiting this lack of clarity in the drafting of the last two sentences of that paragraph and that the Commission should take the opportunity offered by the sector inquiry to make it clear that such an approach is not justified.

Quality and equivalence

39. As the Commission notes at para.56 of the Vertical Guidelines, the imposition on members of a brand’s selective distribution system of criteria for online sales that are not “overall equivalent” to the criteria imposed for sales in an offline environment amounts to a hardcore restriction of competition. Amazon agrees with the Commission that this does not mean that criteria for offline and online retail must be identical but

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6 This may in part be due to the history of this sentence, which was inserted into the draft Vertical Guidelines late in the legislative process, without any stakeholder consultation.
that, rather, criteria should pursue the same objectives and achieve comparable results, with any differences being justified by differences between the distribution methods.

40. It is certainly not the case that online stores and marketplaces are inherently unable to protect brand image, in particular when it comes to a high-quality online experience such as that offered by Amazon. To give just two examples of ways in which Amazon protects brands’ legitimate requirements for presenting their products:

- Amazon enables manufacturers and retailers to embed prestigious brand products within the respective corporate identity via tailored “landing pages” – so-called brand stores. Many manufacturers of branded products have set up such a brand store on Amazon that shares many design elements with their own online stores. (A screen shot of such brand stores is included at Annex 2.) This shows that Amazon makes it possible for brands and their sellers to fully comply with their corporate identity and that a complete ban on the use of marketplaces cannot be justified on this ground.

- Amazon also sets up so-called “premium beauty stores”, especially for cosmetic brands, which enable prestigious brands to be represented adequately on the Amazon Marketplace. There is no practical difference between the representation on the Amazon website and the one on the retailer’s website.

41. This, and the experience offered by many other high quality online retailers and marketplaces, demonstrates that the assumption that such sales channels are inherently inadequate for protecting brand image is an outdated cliché that neglects both the ongoing technical innovation in online retail and consumer behaviour, which has readily adapted to such innovation. [Confidential Information] In any event, there are less severe means than imposing blanked restrictions such as a general marketplace ban that would be able to address any legitimate “brand image” concerns, e.g. a requirement that a marketplace must meet objective quality criteria.

42. In fact, by using high quality marketplaces such as the one offered by Amazon, retailers typically facilitate the provision of additional advice and information that often go beyond services provided in-store or on their own websites, to the advantage of the
consumers. Such additional services include e.g. customer ratings, product descriptions by customers and manufacturers, price comparisons or demonstration videos. This is supported by the FCO’s comprehensive market investigations as set out in its submission to the German Federal Court of Justice (BGH) on the Deuter case7. Hence, marketplace bans result in a reduction of the services available to consumers, instead of safeguarding them.

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7 See submission of the President of the German Federal Cartel Office on the case cortexpower.de GmbH vs Deuter Sport GmbH, 7 July 2016, KZR 3/16, p. 22 et seqq.: “Based on the current status of E-Commerce, there is no reason to assume that the level of services available in online distribution to satisfy a customer’s need for advice necessarily has to stay behind similar services available in offline distribution. Rather, online distribution today offers the opportunity to explain the use of even the most complex products by providing centralized, professional information (including tutorials in the form of films). An additional advantage of this kind of information is that it is available to the customer not only at the moment of the purchase, but also at a later point when the product is used by the customer for the first time. The provision of advice in online distribution often exceeds similar services in the offline world, which is why many customers are informing themselves online before purchasing the product in a physical store.”
Conclusion

43. Amazon views the Preliminary Report as a strong step in the right direction. Amazon encourages the Commission to develop its thinking further in its final report, by stressing the benefits of e-commerce for consumers and emphasising the harmful effects of common restrictions such as physical store requirements and marketplace sales bans. For the reasons set out in these comments, the Commission should clarify in its final report, and through urgent revision of the Vertical Guidelines, that such restrictions may amount to hardcore restrictions of competition.

44. [Confidential Information]

45. For the reasons set out above, we consider that our suggested approach to physical store requirements and marketplaces bans is compatible with the current text of the VBER, as clarified through revised Vertical Guidelines. Should the Commission disagree, we would suggest that it should bring forward its review of the VBER, rather than wait until its scheduled expiry in 2022.
Annex 1

[Confidential Information]
Annex 2: Comparison of brand retail websites vs Amazon brand stores
Waterman Markenshop

Ihre zuletzt angesehenen Artikel und besonderen Empfehlungen
Die BOSS Menswear Kollektion bietet alles vom präzise geschnittenen Business Anzug, als Upgrade Ihrer Arbeitsgarderobe, bis hin zu lässigen Freizeit-Outfits.

- Slim-Fit Anzug aus strukturiertem Schurwolle 'Novara' von BOSS: 499,00 €
- Slim-Fit Anzug aus Schurwolle-Mix 'Novara' von BOSS: 499,00 €
- Fest gemusteter Regular-Fit Anzug aus Schurwolle 'Johnston&Jefferson' von BOSS: 499,00 €
Hugo Boss brand store at Amazon.de
Top-Kategorien

- Tops & Shirts
- Herrenhosen
- Schuhe & Sneaker

Key-Looks der Frühjahr/Sommer-2016-Kollektion

- Key-Looks Herrenbekleidung
- Key-Looks Damenbekleidung
Deuter

Entdecken Sie Rucksäcke, Taschen und Accessoires von Deuter im Online-Shop bei Amazon.de.

RUCKSÄCKE UND TASCHE

TREKKINGRUCKSÄCKE

KINDERRUCKSÄCKE

WANDERRUCKSÄCKE

SPORTLICHE MODELLE FÜR DIE BERGE

DAYPACKS

ACCESSOIRES
Asics website
Asics brand store at Amazon.de