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# Possible theories of harm as regards Amazon's business practices

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**Abstract**

In the paper I take a look at what competition law infringements could Amazon possibly be found to be in breach of, and I also describe what we know so far of the European Commission's two cases involving Amazon. Based on the public information available so far as regards the two cases of the European Commission (Amazon Marketplace and Amazon Buy Box cases), it seems that they are both centered around leveraging of market power by some kind of preferential treatment, be it towards Amazon itself or its FBA sellers, however, the rest is yet to come.

## 1 Introduction

In my previous paper[1] I analyzed how online platforms – especially those acting in a hybrid or dual rule – operate. I paid special attention to Amazon's business model and its hybrid nature. Amazon is and has been the subject of competition authorities' investigations in different countries in recent years.[2] The same tech giant is in the center of attention of the present paper in which I will now turn to the possible competition law infringements that either the European Commission, or a national competition authority could establish in a case involving Amazon. In Section 2, I will shortly describe what we know about the two cases of the European Commission into Amazon's business practices so far. In Section 3 of this paper, I will analyze what type of infringements could Amazon be found 'guilty' of based on its general conduct and the specialties of its business model.

## 2 What we know about the European Commission's cases concerning Amazon

When opening the formal investigation, at the beginning the European Commission did not precise whether it would investigate Amazon's practices under Article 101 or 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU"), neither did it indicate a specific theory of harm. It might be that it decided not to specify it yet because of the very complex nature of Amazon's businesses, which could also mean that there is a possibility to find a new, sui generis infringement. Since then, however, the European Commission did

[1] FANNI OROSZI,' The Hybrid Role of Platforms, with Special Regard to Amazon', Pázmány Law Working Papers, 2021/1.

[2] Including Germany (abuse of dominance, case closed with Amazon amending its general terms of business for sellers on its Marketplace), Austria (unfair trade practices, case closed with Amazon modifying its terms and conditions), Italy (abuse of dominance in breach of Article 102 TFEU, preferential treatment of FBA sellers).

provide us with some more specific scope for its first investigation, and also announced a second investigation into the company's practices.[3] As one author puts it, '[t]he two cases are variations on the theme of self-preferencing'.[4] Moreover, the center of both cases is Amazon's different ways of using data in its own favour. The reason for that is that platforms, such as Amazon, are able to 'exploit detailed information about individual buyers and suppliers, leading to novel problems of exclusion'[5] as big data is able to allow companies 'to provide consumers with products and services that more closely fit their preferences' or 'identify desirable product improvements'.[6]

### 2.1 The Amazon Marketplace case

The first case, in which the European Commission has already sent its Statement of Objections to the company, concerns Amazon's use of marketplace seller data.[7] The European Commission states what we have already known, that Amazon has a dual role as a platform: it is a marketplace service provider and it also sells its own products as a retailer on the same marketplace.[8] Thus, it is both a service provider and a competitor in relation to third-party sellers using its marketplace. In its service provider role, Amazon has access to different types of 'non-public business data of third-party sellers' and the authority's preliminary findings are that this data is available to Amazon's employees in its retail business and that it is part of the automated systems. [9] This automated system of the retail business is aggregating this data and uses it in order to 'calibrate Amazon's retail offers and strategic business decisions to the detriment of other marketplace sellers.[10] The most interesting part of the press release is, of course, when the European Commission lines out its preliminary views, that Amazon might be in infringement of Article 102 TFEU with 'the use of non-public marketplace seller data' which 'allows Amazon to avoid the normal risks of retail competition and to leverage its dominance

[3] European Commission, Press Release (IP/20/2077),' Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices'. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077

[4] PABLO IBANEZ COLOMO, 'The Commission sends Amazon an SO: the rise of common carrier antitrust', Chillin'Competition, 10 November 2020. https://chillingcompetition.com/2020/11/10/the-commission-sends-amazon-an-so-the-rise-of-common-carrier-antitrust/

[5] JONATHAN B. BAKER, 'The Antitrust Paradigm, Restoring a Competitive Economy', Harvard University Press, Cambridge, 2019., p.120.

[6] *Ibid.*at p. 128.

[7] *Supra* note 3.

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

in the market for the provision of marketplace services in France and Germany – the biggest markets for Amazon in the EU'.[11]

Even though it takes two to tango, according to one author, the wording as regards avoiding the normal risks of competition is inspired by the definition of concerted practices.[12] In the view of the author of this paper, this inspiration might only refer to the possible advantage that Amazon has over third-party sellers present on Amazon Marketplace and to the case law of leveraging market power from one dominant market to the other non-dominant one. This is so because the advantage might make it possible for Amazon to deviate from competing on the merits, i.e. avoid the normal risks of competition on the retail market.[13] However, this concept does not take into consideration one thing: retail competition does not take place on the narrow market the European Commission plans to use as the basis of establishing the dominance of the Amazon, namely the market for the provision of marketplace services. On the contrary, risks of retail competition *do* constrain the platform, as Amazon as a retailer itself on its own Marketplace and the Amazon Marketplace as a whole is competing with other retailers both offline (i.e. brick-and-mortar shops) and online, independent of their business model.

Moreover, what is the rationale behind Amazon allegedly using this non-public business data to the detriment of its marketplace sellers, i.e. why would Amazon bite the hand that feeds it? One of the things that makes Amazon special compared to other market players is its multi-sided nature. When analyzing harm to competition in relation to multi-sided platforms, 'feedback effects' between the different sides of the platform should be considered.[14] This multi-sidedness, amongst many things, brings with itself interdependence between the different sides: if Amazon would use this business data to the detriment of its sellers, it could risk losing them. Losing sellers, however, could mean losing buyers, too with the number of choices decreasing.

The case also objects the fact that business data is available to employees of Amazon and that it flows into the automated system of Amazon and then being used in the calibration of Amazon's retail offers and strategic business decisions. This, both in relation to employees and to the automated system seems to question whether Amazon respected its general duty of care

[11] *Ibid.*
[12] *Supra* note 4.
[13] THOMAS HÖPPNER,'Monopoly Leveraging & Equal Treatment: the EU Commission's Google Shopping Decision', Lexology, 17 November 2017.
[14] JONATHAN B. BAKER, *supra* note 5, p.182.

towards the controlling of its employees' conduct and the operation of its system and whether it is liable for these practices. This concept seems like 'something borrowed' from the law of unfair commercial practices.

No consideration has been given so far by the European Commission to 'the pro-competitive benefits and efficiencies of data use and self-preferencing conduct, such as the benefits to users of platforms and the injection of competition into different markets.[15]'

### 2.2 The Amazon Buy Box case

The European Commission announced a second investigation as well which looks into whether Amazon is artificially favouring its own retail offers and offers by marketplace sellers using the Fulfilment By Amazon (hereinafter referred to as **"FBA"**) services (hereinafter referred to as **"FBA Sellers"**) compared to other third-party sellers.[16] According to the Commission, this might be reflected in the criteria in selecting the winner of the 'Buy Box' and in enabling third-party sellers to offer products to Amazon Prime users.[17] The Commission suspects that this could lead to Amazon self-preferencing its own services and giving preferential treatment to FBA Sellers.[18] The second investigation, just as the first one, is connected to the use of algorithms and data that is fed into the algorithm choosing the winner of the Buy Box placement.[19] Amazon's conduct of allegedly inducing third-party sellers present on its Marketplace platform to start using its FBA service in order to get higher placement in search results is categorized as **offensive leveraging** by one author.[20] This offensive leveraging is connected to the self-preferening of Amazon and to the preferential treatment it gives to FBA sellers, but the Commission, at least based on what is included in its press release in that regard, approaches the situation from the other side, i.e. it finds a problem not in inducing sellers to become FBA Sellers but in treating already existing FBA Sellers in a more favourable way.

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[15] MARTIN DICKSON, RIKKI HARIA, BERTRAND GUERIN, JAMES AITKEN, THOMAS LÜBBIG, 'A Prime example of the issue with Big Data? – European Commission issues Statement of Objections in Amazon probe', 17 November 2020. Available at https://digital.freshfields.com/post/102gkbz/a-prime-example-of-the-issue-with-big-data-european-commission-issues-statemen.

[16] *Supra* note 3.

[17] *Supra* note 3.

[18] *Supra* note 3.

[19] MARTIN DICKSON, RIKKI HARIA, BERTRAND GUERIN, JAMES AITKEN, THOMAS LÜBBIG, *supra* note 10.

[20] NICOLAS PETIT, 'Big Tech and the Digital Economy, The Moligopoly Scenario', Oxford University Press, Oxford, 2020, p.12-3.

### 2.3 A possible (and probable) scenario

In the author's view, the European Commission's aim is first to establish Amazon's dominance on the market for online marketplace services on which the demand side constitutes of sellers of various retail products and the supply side constitutes of online marketplace service providers. This already seems to be a narrow market definition; however, it is possible to narrow it down even more those marketplace service providers which offer their services only to retail products. This would exclude specialized online marketplace service providers for e.g. drivers (Uber) or restaurants (Wolt, Deliveroo). If it will be able to arrive to the conclusion that Amazon is dominant on the market for online marketplace services (either in general or only for retail products), the European Commission will turn to the analysis of Amazon's alleged preferential treatment realized via leveraging its existing dominance on the market for online marketplace services to the online retail markets by way of which it distorted competition on that market. Meaning that consumers could be harmed indirectly by Amazon engaging in such a conduct aiming to exclude its competitors present on its Marketplace and thus on the online retail markets.

## 3 Possible theories of harm as regards Amazon's practices in general

In the course of investigations into the practices of online multi-sided platforms, the difficulty that antitrust authorities face is to find a proper theory of abuse.[21] According to POSNER, industries of the 'New Economy', which include 'the provision of services by Internet-based businesses' 'differ markedly from most of the ones in which antitrust doctrine developed'.[22] The usual price-oriented antitrust analysis in these cases may be irrelevant, since many consumers pay nothing for the services they use and firms compete more through technological advancements than through lower prices.'[23] The business strategy pursued by Amazon suggests that if antitrust authorities want to fully understand the company's practices and the structural power that it amasses, it must be looked at as an 'integrated entity.'[24]

[21] FRISO BOSTOEN, 'Online Platforms and Vertical Integration: The Return of Margin Squeeze?' (2018) Stockholm Faculty of Law Research Paper Series, no 42, retrieved on 18 April 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075237, p.1.

[22] RICHARD A. POSNER, 'Antitrust Law', The University of Chicago Press, Chicago and London, Second Edition, 2019., at p. 245.

[23] HOWARD A. SHELANSKI, 'Information, Innovation, and Competition Policy for the Internet', (2013) University of Pennsylvania Law Review, Vol. 161:1663-1667., at p.1665.

[24] LINA M. KHAN, 'Amazon's Antitrust Paradox' (2017) Yale Law Journal, Vol. 126, p.710-805, at p.747.

If the European Commission or other, national competition authorities were to isolate one of Amazon's many business lines and was to assess the prices of that exact segment, it would not be able to establish 'the true shape of the company's dominance', and the practices that it engages into 'to leverage advantages gained in one sector to boost its business in another.'[25] It is assumed that rational firms' aim to drive out their competitors from business, but Amazon's strategy is different: by expanding into multiple business lines and making itself indispensable to e-commerce, it 'enjoys receiving business from its rivals, even as it competes with them.'[26] Apart from that, it also collects information from these companies as a service provider, which plays a role in it having an advantage over them.[27] The interconnection between the two or more sides of the markets in case of online platforms exhibits direct and indirect network effects.[28] The more intense these network effects are, the more complex the analysis of becomes, as any action on one side of the market affects the other side as well.[29]

### 3.1 Possible theories of harm under Article 101 TFEU

Article 101(1) TFEU prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.' Article 101(1) TFEU emphasizes that some types of agreements are considered to be infringements in particular, however, the list that it includes is not exhaustive. Information exchange is one of the conducts that might infringe Article 101 TFEU. It can take various forms: it can be shared directly between competitors, indirectly through for example a trade association or other third party, and also through the suppliers or retailers of a company.[30] It can lead to restrictions of competition in particular if thanks to the information, companies become aware of the market strategies of their competitors.[31] However, its outcome depends on the market and on the nature of the information exchanged as well.[32]

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[25] *Ibid.*
[26] *Ibid.,* p.755.
[27] *Ibid.*
[28] DANIEL MANDRESCU, 'Applying EU competition law to online platforms: the road ahead - Part 1', (2017) European Competition Law Review, 38(8), p.353-365., at p.361.
[29] *Ibid.*
[30] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2011/C 11/01), retrieved 2 May 2020, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29, para. 55.
[31] *Ibid.,* para. 58.
[32] *Ibid.*

It could be established that the data collection and data usage by Amazon concerning third-party sellers on its Amazon Marketplace amounted to an **information exchange between rival merchants**.[33] Nevertheless, this should be considered to be an agreement or a concerted practice to be prohibited under Article 101(1) TFEU.[34] The 'concept of an agreement […] centers around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.'[35] However, if the information exchanged is strategic, and thus strategic uncertainty on the market is reduced, facilitating collusion, the practice can amount to a concerted practice.[36]

The text of particular contracts that were entered into by and between Amazon and its retailers are not known. However, the Amazon Services Europe Business Solutions Agreement (hereinafter referred to as the "Agreement") is available on one of Amazon's websites. Clause 4, titled 'Licence' of the Agreement states the following:

> 'You grant us a royalty-free, non-exclusive, worldwide, right and licence for the duration of your original and derivative intellectual property rights to use, *any and all of Your Materials for the Services or other Amazon product or service,* and to sublicense the foregoing rights to our affiliates and operators of Amazon Associated Properties […] nothing in this Agreement will prevent or impair our right to use Your Materials without your consent to the extent that such use is allowable without a licence from you or your affiliates under applicable law.'[37] (Italics by me.)

The term 'Your Materials' mentioned in Clause 4 means 'all Technology, Your Trademarks, Content, Your Product information, data, materials, and other items or information provided or made available by you or your affiliates to Amazon or its affiliates.'[38]

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[33] THOMAS HÖPPNER, PHILIPP WESTERHOFF, 'The EU's competition investigation into Amazon Marketplace', (2018) Kluwer Competition Law Blog, retrieved 22 April 2020, http://competitionlawblog.kluwercompetitionlaw.com/2018/11/30/the-eus-competition-investigation-intoamazon-marketplace/?doing_wp_cron=1588683488.8899700641632080078125

[34] *Ibid.*

[35] Case T-41/96, Bayer v Commission [ECLI:EU:T:2000:242], para. 69.

[36] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para. 61.

[37] Annex 1. Extract of Amazon Services Europe Business Solutions Agreement, Clause 4.

[38] Annex 1. Extract of Amazon Services Europe Business Solutions Agreement, Definitions.

Moreover, the definition of 'Confidential Information' is as follows:

> 'information relating to us [Amazon], to the Services or Amazon customers that is not known to the general public including, but not limited to, any information identifying or unique to specific customers; *reports, insights, and other information about the Services, data derived from the Services except for data* (other than customer personal data) *arising from the sale of your products comprising of products sold, prices, sales, volumes and time of the transaction*; and technical or operational specifications relating to the Services.'[39] (Italics by me.)

According to the Agreement, 'Service' includes 'each of the following services that Amazon makes available on one or more of the Amazon Sites: the Selling on Amazon Service, the Fulfilment by Amazon Service, Sponsored Ads, and any related services we make available.'[40]

Clause 11 of the Agreement titled 'Confidentiality and your Personal Data' reads that sellers 'may receive Confidential Information' when using the 'Services' of Amazon. However, this information remains the property of Amazon until the Agreement is in place and five years after its termination and third-party sellers shall comply with several obligations set out by Amazon. They should not, amongst others, use the information more than 'reasonably necessary' for the participation in the 'Services' and they should not disclose it to any third-party.

Looking at these clauses, it might be that 'Confidential Information' comprises strategic information[41]. Although, the definition says that it does not include data arising from the sale of the seller's products, it does include 'reports, insights, and other information about the Services.' These could include data concerning other third-party sellers as well. '[E]xchanges of genuinely aggregated data, that is to say, where the recognition of individualized company level information is sufficiently difficult, are much less likely to lead to restrictive effects on

[39] *Ibid.*
[40] *Ibid.*
[41] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para. 86. 'Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results.'

competition than exchanges of company level data'[42], however, the nature of this data is not yet known.

If Amazon could argue that the information gathered and used is related only to the 'matching functionality of the marketplace', it is not linked to its own retail activities, and it is used to innovate its services, it could justify its conduct.[43] This would concern its vertical relationship with merchants on Amazon Marketplace.

Nevertheless, there is a horizontal link as well, namely between retailers and Amazon in the instances when it is acting as a retailer itself on its own platform. In case if the data concerns strategic information, the European Commission could either establish the existence of an indirect information exchange in the form of a hub-and-spoke cartel, where Amazon is the hub and the third-party sellers are the spokes, or the existence of a direct information exchange between Amazon and third-party sellers.

In case of a direct information exchange, even if the third-party sellers were forced into the agreement, that does not matter in relation to the existence of the agreement.[44] However, the 'proof of an agreement […] must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators.'[45] Moreover, the specific economic context of the case must also be taken into account.[46] In the specific economic context, if we assume that the third-party sellers do not have any interest in providing Amazon with more information and that they accept the standard terms of Amazon because they are not in the position to argue with the service as they lack enough bargaining power, the practice of Amazon to make the conclusion of its contracts subject to the obligation of third-party sellers to share their data, that Amazon becomes the proprietor of, could be considered as a **unilateral conduct.** Should it be considered as such, Amazon's conduct could be caught under Article 102 TFEU instead of Article 101 TFEU.

[42] *Ibid.,* para. 89.
[43] *Supra* note 33.
[44] RICHARD WHISH, DAVID BAILEY, *Competition Law,* (2018) Oxford, Oxford University Press, p.104.
[45] Case T-41/96, Bayer v Commission, [ECLI:EU:T:2000:242], para 173.
[46] Case T-65/98, Van den Bergh Foods v Commission, [ECLI:EU:T:2003:281], para 84. '[C]ontractual restrictions on retailers must be examined not just in a purely formal manner from the legal point of view, but also by taking into account the specific economic context in which the agreements in question operate, including the particular features of the relevant market, which may, in practice, reinforce those restrictions.'

Conversely, in case if a concurrence of wills between the parties exists, and if the requirements of a **hub-and-spoke cartel** would be met, an infringement of Article 101(1) could be established. '[H]ub-and-spoke arrangements are forms of horizontal coordination that are implemented through vertical arrangements between actors on different levels of the market.'[47] They are cartels that are not co-ordinated through direct exchanges between competitors on the same level of the market, but through indirect exchanges with the help of a vertically related supplier or retailer. [48] In the case of Amazon, this would mean that third-party retailers are using Amazon, which is vertically related to them, to co-ordinate their behaviour. There has been no case law on a European Union level yet which would have established such a cartel, however, the main requirement that we can derive from the United States and different European countries is that there has to be proof of 'a horizontal connection between the spokes, a rim and an awareness of all actors involved.'[49] **Meeting these requirements nevertheless seems unrealistic in the case of Amazon Marketplace, especially that there has to be a horizontal connection between the spokes.** Should the European Commission rely on these requirements, it would probably not be able to establish a hub-and-spoke cartel in its decision. Nonetheless, it might set up its own requirements to the establishment of such or a similar in-direct information exchange practice in which case it might be able to establish that Amazon and its retailers infringed Article 101.

### 3.2 Possible theories of harm under Article 102 TFEU

Article 102 TFEU prohibits '[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it.' Conversely to Article 101 TFEU, Article 102 TFEU prohibits unilateral conducts of undertakings having a dominant position.[50] In order to establish whether an undertaking abused its dominant position and thus infringed Article 102 TFEU, first the relevant geographic and product market must be defined.[51] Market definition is

[47] Organisation for Economic Co-operation and Development (OECD), Roundtable on Hub-and-Spoke Arrangements – Background Note (2019), retrieved 2 May 2020, https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf, p.18.

[48] *Ibid.*, p.2.

[49] *Ibid.*

[50] DANIEL MANDRESCU, 'Applying EU Competition Law to Online Platforms: the Road Ahead – Part 2' (2017) *European Competition Law Review*, 38(9), p. 410-422., at p.410.

[51] Case 6/72, Europemballage Corporation and Continental Can Company Inc. v Commission, [ECLI:EU:C:1973:22], para. 32.

the 'foundation stone' on which the case is built.[52] It is 'an attempt to define groups of products, which are substitutable to such an extent that the firms producing them can be perceived as competing against each other.[53] These competing firms are the ones that constrain each other for example in terms of price increases on the relevant market.[54] According to the previous case law of the Court of Justice,

> 'the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.'[55]

This paper argues that the relevant geographic market should at least include the territory of countries where Amazon disposes of international sites.[56] It has 6 sites in total: in the UK, France, Germany, Italy, Spain and one special site only for e-books and Kindle e-reader in the Netherlands.[57] It is possible to order from Amazon Marketplace into other countries as well, where Amazon does not have a dedicated website, thus the geographic market could also comprise those countries where it is possible to make orders on one of Amazon's websites.

The 'relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products characteristics, their prices and their intended use.'[58] In case of two- or multi-sided markets, market definition should take into consideration the different sides of the market, and the difference between transaction and non-transaction platforms must be recognized.[59] In case of transaction

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[52] LAPO FILISTRUCCHI, DAMIEN GERADIN, ERIC VAN DAMME, PAULINE AFFELDT, 'Market Definition in Two-Sided Markets: Theory and Practice', (2014) Journal of Competition Law & Economics, 10(2), p.293–339, at p. 294.

[53] *Ibid.,* p.295.

[54] *Ibid.,* p.295.

[55] Case 6/72 supra note 182, para. 32.

[56] Amazon Worldwide: A Complete List of International Amazon Sites, retrieved 4 May 2020, https://blog.linnworks.com/amazon-global-international-sites. See also: MARK DANIEL ZALOMAJEV, 'Amazon is taking e-commerce market share in Europe', retrieved 2 May 2020, https://www.innels.com/blog/amazon-is-taking-e-commerce-market-share-within-europe.

[57] *Ibid.*

[58] European Commission, Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03), retrieved 2 May 2020, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31997Y1209%2801%29, para. 7.

[59] LAPO FILISTRUCCHI, DAMIEN GERADIN, ERIC VAN DAMME, PAULINE AFFELDT, *supra* note 52, at p.295.

platforms, such as Amazon, according to some views, a single system market should be defined: comprising both the primary market for third-party sellers joining Amazon Marketplace and the secondary market for them using it as a platform to sell their products to consumers.[60]

There are views saying that in the Amazon Marketplace case, the European Commission will define the relevant product market as the market for online merchant platforms[61], which, based on the most recent press release of the Commission[62], will actually be the case in at least one of the two on-going European Commission cases. This means that the European Commission is currently looking at the market power of Amazon not on the market on which Amazon competes with other sellers of different consumer goods, but on the market on which sellers are looking for different possibilities to sell their products, i.e. on the market for the provision of online marketplace services. In this case, would the European Commission establish the dominance of the platform, it would establish it in relation to other online marketplace service providers, such as eMAG Marketplace which has a presence in Hungary, Romania and Bulgaria.

Nevertheless, the author of this paper argues that, in the eyes of the end-users, i.e. buyers, online merchant platforms might be interchangeable with the online shops of brick and mortar stores. Moreover, more and more businesses, that originally did not have a presence on the Internet, decide to migrate their services and launch e-commerce businesses instead.[63] When a consumer decides to purchase a product, he or she most probably takes into consideration, apart from online merchants, other online shops as well, moreover, he or she will not only look at general, multi-product sites, but also at specialist ones. For example, in case if a consumer is looking for a coffee machine, he or she can look for it not only on Amazon Marketplace, but also in the web shop of different electronics stores. Based on that, Amazon's competitors on the market for the sale of different consumer goods should include eBay, AliExpress, Fnac, Otto and other smaller European and international companies that compete with Amazon Marketplace, including generalist and specialist online stores, and also web shops of brick and mortar stores. However, the interchangeability between online platforms and brick and mortar stores should also be observed.[64] In that case, Amazon could be considered to be competing with both

[60] *Ibid.,* p. 302.
[61] THOMAS HÖPPNER, PHILIPP WESTERHOFF, s*upra* note 33.
[62] *Supra* note 3.
[63] See: 'Nowadays, Otto has left its mail-order business behind and is a true ecommerce leader.' Otto Group, Ecommerce News, retrieved 4 May 2020, https://ecommercenews.eu/companies/otto-group/.
[64] DANIEL MANDRESCU, *supra* note 50, p.411.

generalist and specialist retail stores. The author of this thesis argues that, especially in countries where e-commerce is not as popular yet, this might be the case. Nevertheless, '[f]ast changing markets, such as those related to the Internet, might be hard to define and less subject to the structural presumptions of conventional antitrust analysis.'[65] Thus, if we do take into consideration both sides of the market, in Amazon's case the sellers and the buyers, the substitutability is different: only those undertakings should be put in the same group with Amazon which are substitutable both for buyers and sellers at the same time. This would mean that (online) shops which are not working as platform providers for third-party sellers cannot be considered to be part of the market. The author of this thesis argues that the European Commission will define the relevant market as the market for online merchant platforms on a national, or European level, because this way, it can take into account both sides of the market, and, the defined market would be narrower and could give rise to a more significant market power.

After a proper definition of the relevant market, the dominance of the undertaking must be established. The dominant position of an undertaking

> 'relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.'[66]

The market share of a company can be an indication of its market power, however to define dominance, a combination of several factors should be present.[67] Apart from the competitive structure of the market, the market position of the dominant undertaking and its competitors, the possible expansion on, and entry into the market, and the countervailing market power have to examined.[68] In the case of online platforms, these criteria of assessment might need some adjustments. In dynamic markets, market shares might change drastically in relatively short periods of time, however a 'clear indication of substantial market power in the present must be found.'[69] Entry barriers, thanks to, amongst others, direct and indirect network effects and

[65] HOWARD A. SHELANSKI, *supra* note 23, p.1667.
[66] Case 27/76, United Brands v Commission [ECLI:EU:C:1978:22], para. 65.
[67] RICHARD WHISH, DAVID BAILEY, *supra* note 44, at p.188.
[68] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), retrieved 2 May 2020, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01), para. 12.
[69] DANIEL MANDRESCU, *supra* note 50, p.413.

economies of scale might be higher in case of digital markets.[70] The value of big data that a company possesses is also an important factor,[71] as it is the case with Amazon's data gathering practices on its Marketplace.

When assessing whether Amazon is dominant on the market for online merchant platforms, the European Commission will have to take into account its market shares and its possible future expansion. Moreover, it has to observe the possibility of potential competitors to enter to the market, and whether there has already been or would be a tipping point, where entry is barely or not at all possible anymore. It also has to look at whether third-party sellers and buyers have a countervailing buyer power, i.e. whether third-party sellers and/or buyers would be able to constrain Amazon in case of too high fees or decreasing quality. Should the European Commission establish Amazon's dominance on the market for online merchant platforms, it would have the opportunity to argue that the platform abused its dominance in the following ways.

Abusive conducts can be either exploitative or exclusive. Exploitative conducts are harming consumers directly by the dominant undertaking extracting 'rents from its customers beyond what would normally be achievable.'[72] Exclusive conducts are targeted directly against the rivals of a dominant undertaking, and only harm consumers indirectly, as competitors are excluded from the market, resulting in, e.g. reduced quality or higher prices.[73] In the case of Amazon, however, an abusive conduct can seemingly be exploitative and exclusionary at the same time because of its hybrid role as a platform provider and a retailer. If, as it is alleged, Amazon uses the information about third-party sellers that it collected as their service provider, and then it uses this information for the good of its own retail services (to offer better services and/or lower prices), it directly harms its rivals on the downstream market, which can result in their exclusion from the market (exclusionary practices), and its customers, i.e. the same third-party sellers (exploitative practices). The author of this paper thus argues that the hybrid role of Amazon might bring with itself a complex, hybrid infringement of Article 102 TFEU, encompassing more than one abusive practice. There are various roads that the European Commission could take in this regard.

[70] *Ibid.*
[71] *Ibid.*
[72] TÂNIA LUÍSA FARIA, 'Abuse of a Dominant Position in the Digital Economy, in the EU and the US: the Big Four and the War of the Worlds' (2020) European Competition Law Review, 41(3), p.144-151., at p.147.
[73] *Ibid.*

### 3.2.1 Discriminative leveraging

As the dominance, the abuse and the effects of the abuse are not necessarily present in the same market[74], the European Commission or a national competition authority could argue that Amazon is leveraging its existing market power as a marketplace owner based on the data that it collects concerning the products and sales of third-party sellers, in order to increase the sales of its own products and exclude third-party sellers.[75] Indeed, thanks to its business model, Amazon has already been able to create market power based on different platforms in different relevant markets.[76] This would make it easier for Amazon to leverage its market power even from other business lines, for example Amazon Web Services. However, leveraging is not a standalone infringement, it has to involve another conduct as well that the company is able to perform on one market because its dominance on another market makes it possible.

### 3.2.2 Unfair trading conditions

Amazon is allegedly less likely to enter the downstream market of a certain product when the merchant is already using the distribution system of Amazon. It could be argued that this way Amazon is abusing its dominance by treating some of its retailers in a less favourable way, in order to increase its profits from the fees that they have to pay for Amazon's additional services. Moreover, another motivation could relate to the collection of data, as the more services Amazon provides, the more data it can gather. This conduct could be established to be in conflict with Article 102(a) TFEU, which prohibits undertakings from 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.' This, of course, is not a direct obligation, nevertheless, merchants might decide to opt-in for Amazon's additional services in order not to be threatened by the entry of the platform provider to the market of their product. The Italian competition authority is currently investigating whether Amazon offers 'better conditions in terms of visibility and sale optimization to retailers that outsource logistics to the U.S. tech giant than to retailers that do not.'[77]

Moreover, if one decides to become an Amazon seller, he or she must accept the terms provided by Amazon. These terms include very extensive rights to be granted by the seller to Amazon

[74] RICHARD WHISH, DAVID BAILEY, *supra* note 44, at p. 211.
[75] TÂNIA LUÍSA FARIA, *supra* note 72, p.147.
[76] *Ibid.,* p.145.
[77] THIBAULT LARGER, 'Italy Competition Watchdog Opens Probe into Amazon, adding to EUlist', (2019) Politico, retrieved on 4 May 2020, https://www.politico.eu/article/italy-competition-watchdog-opens-probe-into-amazon-adding-to-eu-list/.

concerning their intellectual property rights and information related to their products.[78] It is alleged that Amazon uses this data to enter the market of the concerned products and provide a better service and a lower price, that it could not do if it would lack the relevant information. This conduct, if established, would infringe Article 102(a) TFEU, as it imposes unfair trading conditions on third-party sellers using Amazon Marketplace and grants an unfair advantage to Amazon. The same conduct, however, can also be regarded as self-preferencing.

### 3.2.3 Self-preferencing

The question of favouring by a dominant undertaking of its own non-dominant product is controversial.[79] Self-preferencing practices are a 'form of discrimination' when a 'monopoly firm uses its position in the tipped market to favor its own products in the untipped market'.[80] Amazon, active on the upstream intermediation market for merchant platforms, could be accused of infringing Article 102(c) TFEU by favouring its own downstream services on the downstream online retail market. In the Google Search (Shopping) case, the European Commission held that Google abused its dominant position in general online search by systematically giving prominent placement in its search engine results to its own comparison shopping service, while demoting competing comparison shopping services.[81] Until recently it was not clear whether in such future cases the indispensability requirement has to be met or not.[82] However, in its recent judgement, the Court of Justice of the European Union held that it is not necessary to meet the indispensability requirement set out in the Bronner case.[83] Thus it does not have to be established if Amazon's Marketplace meets the requirement to be considered indispensable or not. In the Amazon case, the alleged preferential treatment given by Amazon to its own products on its Marketplace could be considered to infringe Article 102 as a conduct positioning and displaying more favourably the products marketed by Amazon itself, compared to products marketed by third-party sellers.

[78] Annex 1. Extract of Amazon Services Europe Business Solutions Agreement.
[79] RICHARD WHISH, DAVID BAILEY, *supra* note 44, p.730.
[80] NICOLAS PETIT, *supra* note 20, p. 223.
[81] Commission decision of 27 June 2017, Google Search (Shopping) (CaseAT.39740), Article 1.
[82] PABLO IBÁÑEZ COLOMO, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping', (2019) *Journal of European Competition Law & Practice*, Vol. 10., No. 9., p.532-551., at 532.
[83] DIMITRIOS KATSIFIS, 'The CJEUs ruling on Slovak Telekom, and what it means for cases involving dominant digital platforms', 29 March 2021, The Platform Law Blog, https://theplatformlaw.blog/2021/03/29/the-cjeus-ruling-on-slovak-telekom-and-what-it-means-for-cases-involving-dominant-digital-platforms/

If the European Commission finds that Amazon abused its dominance via using competitively sensitive data that it had acquired as a platform service provider from its merchants on its marketplace and then produced 'copycat' products on its own, that theory of harm can raise 'serious concerns for online commerce.'[84] It might deter undertakings from investing in the making of 'competitively relevant discoveries ex ante', as they have to share the information ex post.[85] Moreover, they might decide not 'to enter sectors where a dominant player can utilize merchants' discoveries to produce copycats'.[86] In that case, there is a need for action from the regulatory side as well in order to protect third-party sellers from being exploited by vertically integrated hybrid online merchant platforms.

### 3.2.4 Predatory pricing

In the Akzo case, the Court of Justice held that '[p]rices below average variable costs [...] by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive.'[87] It could be argued that Amazon had engaged in predatory pricing practices by undercutting prices of merchants on its Amazon Marketplace. Nevertheless, Amazon's business model is different from undertakings involved in previous predatory pricing cases. Moreover, Amazon is, amongst others, a provider of platform services (Amazon Marketplace) but it also has several different business lines, thus it can easily recoup its losses from these other business lines without these recoupments necessarily being traced back to the below-cost pricing. As already mentioned above, Amazon also has a big investor support and can take advantage of the information that it gathers as a platform provider. Thus, Amazon might be recouping its losses encountered via pricing below average variable costs, and thus Amazon could be in breach of Article 102 TFEU. However, thanks to the possibility of recoupment from other business lines and from its investors, it might be the case that Amazon, contrary to what has been established in the case law earlier[88], is not interested in driving out these players from the market.

[84] ALEXANDER M. WAKSMAN, 'Multi-Sided Platforms: three questions for antitrust', (2019) European Competition Law Review, 40(5), p.207-211., at p.211.
[85] *Ibid.*
[86] *Ibid.*
[87] Case C-62/86, AKZO Chemie BV v Commission [ECLI:EU:C:1991:286] para. 7.

[88] *Ibid.* 'A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss.'

As the demand on the two sides of the market are interdependent, pricing is not the same in the world of two- or multi-sided platforms as in other businesses, and pricing below costs could be profit-maximizing, moreover, the platform could charge negative prices as well.[89] Even for a monopolist, if it is a two-sided market, giving away a product for free can be a profit-maximizing strategy: with the number of users increasing on one side thanks to the product being free, the number of users on the other side will also increase, thus the platform is going to be able to recoup its losses.[90] This means that in the case of multi-sided platforms, predatory pricing may even be profit-maximizing in the short term, which is not the case when a one-sided business decides to engage in predation.[91] Platforms might be able to offer successful products at a lower, predatory price when they are already well-established on the market and there is demand for them e.g. by offering their own, private label products.[92]

Thanks to Amazon's business model, it can cut prices deeply and is able to invest heavily in growing its operations constantly, at the expense of its profits.[93] Since Amazon is willing to 'forego profits for growth undercuts a central premise of contemporary predatory pricing doctrine, which assumes that predation is irrational precisely because firms prioritize profits over growth.'[94] It is argued that this strategy could enable Amazon to engage in predatory pricing without being caught by antitrust laws.[95]

## 4 Conclusion

As regards Amazon's business practices, we can conclude that it is more likely that it could be found to be in breach of Article 102 TFEU than of Article 101 TFEU, and would an antitrust infringement be established in relation to Amazon, it would, almost certainly, have something to do with its access to (big) data. What all competition authorities should take into consideration when assessing Amazon's practices, is its multi-sidedness and its dual or hybrid role, as traditional ways of assessing market power, competitive constraints and consumer harm might not always apply in the same way as in relation to traditional industries. Based on the

[89] CHRISTOPHER PICKARD, 'Competition Policy and the Rise of Digital Platforms' (2019) European Competition Law Review, 40(11), p.507-510., at p.508.
[90] LAPO FILISTRUCCHI, DAMIEN GERADIN, ERIC VAN DAMME, PAULINE AFFELDT, *supra* note 52, p.300.
[91] CHRISTOPHER PICKARD, *supra* note 89, p.508.
[92] ROMINA POLLEY, 'Challenges to the dichotomy of horizontal/vertical restrictions of competition in hybrid relationships', European Competition Law Review (E.C.L.R.) 2019, 40(5), p. 212-221., at p.215.
[93] LINA M. KHAN, *supra* note 24, at p.753.
[94] *Ibid.*
[95] *Ibid.*

public information available so far as regards the two cases of the European Commission, it seems that they are both centered around leveraging of market power by some kind of preferential treatment, be it towards Amazon itself or its FBA sellers, however, the rest is yet to come.

## Annex 1 – Extracts of Amazon Services Europe Business Solutions Agreement

Last updated: March 2, 2021

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