A R T I C L E S

Using Competitors' Data – a Role for Competition Law? Some Thoughts on the Amazon Marketplace Case

by

Iga Małobęcka-Szwast*

CONTENTS

I. Introduction
II. Multiple roles of Amazon – already a competition problem?
III. In search of a suitable theory of harm – (mis)use of competitors' data?
IV. Link to the Commission investigation into Amazon's 'Buy Box'
V. Regulation is under way – solution to all problems?
VI. Conclusion

Abstract

Based on the Commission's investigation into Amazon's practices, the article analyses whether Amazon's use of sensitive data from independent retailers who sell via its marketplace may raise anticompetitive concerns and, if so, how they should be tackled, in particular, whether competition law is the right tool to address these concerns. Amazon's conduct, which is being investigated by the Commission, does not easily fit in with well-established theories of harm. Therefore, it is proposed to develop new theories of harm that would be specifically tailored to challenges of digital markets and online platforms' business models. Amazon's conduct could be regarded as a forced free-riding, predatory copying, abusive leveraging or self-preferencing. It is also argued that some of the competition concerns that may arise from the use of competitors' data by online intermediation platforms such as Amazon could be more efficiently tackled by introducing a regulation, such as the Digital Markets Act.

* Iga Małobęcka-Szwast, PhD, Assistant Professor, Department of European Law, Faculty of Law and Administration, University of Warsaw; e-mail: i.malobecka@wpia.uw.edu.pl; ORCID: 0000-0002-4719-4899.

Article received: 6 April 2021, accepted: 21 October 2021.

Resumé

Sur la base de l'enquête de la Commission sur les pratiques d'Amazon, l'article analyse si l'utilisation par Amazon de données sensibles provenant de détaillants indépendants qui vendent par l'intermédiaire de sa place de marché peut soulever des problèmes anticoncurrentiels et, dans l'affirmative, comment les aborder et, en particulier, si le droit de la concurrence est le bon outil pour répondre à ces préoccupations. Le comportement d'Amazon, qui fait l'objet d'une enquête de la Commission, ne s'inscrit pas facilement dans le cadre de théories de préjudice établies. Il est donc proposé de développer de nouvelles théories du préjudice qui seraient spécifiquement adaptées aux défis des marchés numériques et des modèles économiques des plateformes en ligne. Le comportement d'Amazon pourrait être considéré comme un parasitisme forcé, une copie prédatrice, un effet de levier abusif ou un auto-référencement. Il est également soutenu que certains des problèmes de concurrence pouvant découler de l'utilisation des données des concurrents par des plateformes d'intermédiation en ligne telles qu'Amazon pourraient être résolus plus efficacement par l'introduction d'une réglementation, telle que la legislation sur les marchés numériques.

Key words: Article 102 TFEU; competition law; online platforms; use of data; vertical integration.

JEL: K21, K29

I. Introduction

Over the past few years, the use (or rather processing) of consumer personal data has been in the centre of interest of policymakers, legal scholars, firms, which have had to comply with the General Data Protection Regulation (hereinafter: GDPR),[1] and lawyers who helped firms to adapt their policies to the newly introduced data protection laws. At the same time, little attention has been given to the use of business or transaction data by firms, especially those which have privileged access to such data due to their position as an important gateway for business users to reach, and have interactions with, their customers. Although its competitive effects are rather ambiguous, the practice of using such data by vertically integrated platforms for purposes of

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 2016 L 119/1).

their own downstream businesses, which often compete with the businesses of their customers, has gone unnoticed for a while.

The European Commission in its final report on the e-commerce sector inquiry has acknowledged that the practice of vertically integrated marketplaces to use competing sellers' transaction data 'to boost the retail activities of the marketplace operators' can potentially raise competition concerns.[2] Following the Commission's conclusions in its e-commerce sector inquiry from 2017,[3] in September 2018, the Commission announced that it started investigating allegations that Amazon used data from third-party transactions generated in its marketplace to improve its own online retail offerings (Höppner and Westerhoff, 2018). During a press conference in September 2018, the Commissioner for Competition M. Vestager argued that 'if you as Amazon get the data from the smaller merchants that you host – which can be, of course, completely legitimate because you can improve your service to these smaller merchants – do you then also use this data to do your own calculations: as what is the new big thing, what is it that people want, what kind of offers do people like to receive, what makes them buy things?'.[4]

On 17 July 2019, the Commission formally opened an investigation into a possible anticompetitive conduct by Amazon.[5] The Commission's preliminary fact-finding confirmed allegations about Amazon's use of competitively sensitive information about sellers, their products, and transactions on the Amazon marketplace.[6] As part of its in-depth investigation, the Commission examines: (1) the standard agreements between Amazon and marketplace sellers, which allow Amazon's retail business to analyse and use third party seller data, and (2) the role of data in the selection of the winners of the 'Buy Box',[7] and the impact of Amazon's potential use of competitively

[2] European Commission (2017), Commission Staff Working Document accompanying Report from the Commission to the Council and the European Parliament – Final report on the E-commerce Sector Inquiry, COM(2017) 229, p. 186.

[3] European Commission (2017), Report from the Commission to the Council and the European Parliament – Final report on the E-commerce Sector Inquiry, COM(2017) 229 final.

[4] European Commission (2018), Press Conference, 19.09.2018, available at: https://ec.europa.eu/avservices/video/player.cfm?ref=I160574&lg=INT&sublg=none (accessed on 28.07.2021).

[5] European Commission (2019), Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon, Press release, 17 July 2019, available at: http://europa.eu/rapid/press-release_IP-19-4291_en.htm (accessed on 28.07.2021).

[6] Ibidem.

[7] The 'Buy Box' is a box on the product's details page, where customers begin the purchasing process. If the same product is offered by several sellers (including in some instances Amazon itself), Amazon will display only one of them in the Buy Box based on its internal algorithms. Since the majority of buyers purchase items from sellers displayed in the Buy Box, the 'winning seller' enjoys a significant advantage over the competitors (Höppner and Westerhoff, 2018).

sensitive marketplace seller information on that selection. In the view of the Commission, winning the 'Buy Box' appears crucial for sellers since most transactions are completed through it.[8]

On 10 November 2020, the Commission stated that its preliminary view is that Amazon breached EU antitrust rules by distorting competition in online retail markets. It sent Statement of Objections to Amazon for the use of non-public independent seller data (case number AT.40462). The Commission objects to Amazon relying on non-public business data of independent sellers, who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with those third party sellers.[9] Commissioner M. Vestager, in charge of competition policy, emphasised: 'we must ensure that dual role platforms with market power, such as Amazon, do not distort competition. Data on the activity of third party sellers should not be used to the benefit of Amazon when it acts as a competitor to these sellers'.

The Commission has also opened a second investigation into Amazon's e-commerce business practices regarding its 'Buy Box' and the 'Prime' label features (case number AT.40703). In this case, the Commission suspects that Amazon might artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services (so-called 'fulfilment by Amazon' or 'FBA' service). To that end, the Commission will investigate whether the criteria that Amazon uses to choose the winner of the '*Buy Box*', and to enable sellers to offer products to Prime users, under Amazon's Prime loyalty programme, lead to the preferential treatment of Amazon's own retail business or of the sellers that use Amazon's FBA service.

Thereby, the Commission divided its investigation into Amazon's practices into two separate threads: the first one focused on the use of independent seller data, which is central for this article (hereinafter: Marketplace case), and the second one devoted to favouring Amazon's own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services (hereinafter: *Buy Box* case).[10] Despite this formal separation, both investigations are closely linked, which is also discussed below.

Based on the Commission's investigation into Amazon's practices, the aim of this article is to analyse whether Amazon's use of sensitive data

[8] Ibidem. The Commission examines Amazon's practices both from the perspective of Article 101 TFEU (anticompetitive agreements between undertakings) and Article 102 TFEU (abuse of a dominant position).

[9] European Commission (2020), 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, Press release, 10 November 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 (accessed on 28.07.2021).

[10] See: the public case register which includes the Amazon Marketplace case under case number AT.40462 and *Amazon Buy Box* case under case number AT.40703.

obtained from independent retailers who sell on its marketplace may raise anticompetitive concerns and, if so, how they should be tackled, in particular, whether competition law is a right tool to address these concerns. Thus, the analysis in this article focuses on the preliminary findings of the Commission investigation in the Amazon case and builds upon it.

This article is structured as follows. Section two presents the dual role of Amazon and discusses whether the duality, vertical integration of Amazon and inherent conflict of interest within its business model may raise anticompetitive concerns on its own. Section three focuses on identifying the theory of harm suitable to capture Amazon's practices, and analyses potential remedies that can be imposed by the Commission to counteract possible anticompetitive effects of Amazon's practices. Section four briefly discusses the link between the Commission's investigations into Amazon's practices in the Marketplace case and the *Buy Box* case, which provides a wider perspective over Amazon's business strategy. Section five looks at the Commission's Proposal for the Digital Markets Act, and ponders whether introducing a regulation, such as the Digital Markets Act, may solve some of the competition concerns that may arise from the use of competitors' data by online intermediation platforms such as Amazon. The final section provides conclusions and possible future developments in this matter.

II. Multiple roles of Amazon – already a competition problem?

Amazon is a vertically integrated firm that plays multiple roles[11] and is active on many often unrelated markets. Apart from being one of the world's largest online marketplaces,[12] Amazon is also an online retailer, a provider of delivery and logistics services, of payment services, a live-streaming platform, a cloud computing platform, an AI assistant and many more.[13] Given all the above roles, Amazon's vertical integration and its strategy to expand to more and more new markets, Amazon can be regarded as a digital conglomerate (Bourreau and de Streel, 2019; Petit, 2016; Ross Sorkin, 2017). It has created

[11] For a more detailed description of Amazon's business strategy and sources of its current dominance, see: Arcemont, 2020; Khan, 2018.

[12] The World's Top Online Marketplaces 2020, available at: https://www.webretailer.com/b/online-marketplaces/ (accessed on 28.07.2021).

[13] Amazon started as an online marketplace for books but then expanded the scope its activities to sell almost anything online, provide payment services, cloud computing, delivery and logistics services, develop an AI assistant, as well as produce and distribute movie and television series through its digital streaming platform.

a unique ecosystem of products and services that accounts for its entrenched market position (Khan, 2017).

Although Amazon's operations go far beyond being an online marketplace and a retailer, the Commission focuses its investigation only on these two roles (Commission, 2020), and so does the analysis in this article.[14]

On the one hand, Amazon provides an online marketplace (Amazon Marketplace) and acts as an intermediary linking buyers (consumers) and independent sellers who wish to sell their products via the marketplace. Amazon provides third party sellers with optional logistics and delivery services (so called 'Fulfilment by Amazon' or 'FBA' service).[15]

On the other hand, Amazon is one of the largest online retailers itself and creates its private labels of products that are listed on the marketplace (such as Amazon Basics).[16] Thereby, it competes with products of third party sellers that are sold via its marketplace (Arcemont, 2020; Höppner and Westerhoff, 2018).

It can be argued that such a dual role creates a substantial conflict of interest for Amazon, since in many instances Amazon's customers (business users) are also its competitors (Khan, 2017).[17] By acting as a marketplace, Amazon gains access to competitively sensitive data about the products and transactions of independent retailers (its competitors) selling on its platform, which could be used by Amazon to enhance its own retail activities (Höppner and Westerhoff, 2018).[18]

This is also a concern for the Commission. The Commission suspects that Amazon uses its privileged position to collect competitively sensitive and non-public business data of third party sellers, such as the number of ordered and shipped units of products, the sellers' revenues on the marketplace, the number of visits to sellers' offers, data relating to shipping, sellers' past performance, and other consumer claims on products, including activated guarantees. The Commission emphasises the non-public nature of this data – such information

---

[14] For a comprehensive antitrust analysis of Amazon's behaviour, see: Khan, 2017.

[15] Amazon, Fulfilment by Amazon (FBA) | How It Works, available at: https://sell.amazon.com/fulfillment-by-amazon.html (accessed on 28.07.2021).

[16] D. Green (2019), Amazon says its private labels amount to only 1% of its business, but new data shows some are seeing huge growth, 24.04.2019, available at: https://www.businessinsider.com/amazon-private-labels-some-grow-quickly-data-shows-2019-4?IR=T (accessed on 28.07.2021); Kabiri and Helm, 2018.

[17] See also: Monopolkommission (2015), Competition policy: The challenge of digital markets, Special Report No 68, available at: https://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf (accessed on 28.07.2021).

[18] See also: European Commission (2017), Commission Staff Working Document accompanying the document Final report on the E-commerce Sector Inquiry, COM(2017) 229, p. 186.

is generally confidential and, for a reason, not publicly available to third parties. This data reveals competitively sensitive information that can be used to the detriment of sellers by its competitors, for example, to undercut prices to marginalise competing sellers. If a competitor (Amazon) gains access to such data, conflicts of interest seem inevitable (Khan, 2017).

According to the Commission's preliminary findings, these data are then made available to employees of Amazon's retail businesses, and used to calibrate Amazon's retail offers and adopt strategic business decisions, including whether to launch its own 'copycat' product. Thereby, thanks to the data advantage gained as a marketplace provider, Amazon can focus its retail offers only on the best-selling products and 'avoid the normal risks of retail competition and to leverage its dominance in the market for the provision of marketplace services'.[19] By using its Marketplace for this purpose, Amazon can increase sales while shedding risk – Amazon starts selling its private label products once their success has been tested by third-party sellers, who bear the initial costs and uncertainties when introducing new products (Khan, 2017).

However, neither the dual role of Amazon nor its access to sensitive business data or its vertical integration create a *per se* competition problem (Ibáñez Colomo, 2018; Lamadrid, 2019). Nonetheless, one cannot fail to take note that these characteristics create an uneven playing field for third party sellers and place them at a considerable competitive disadvantage. Although the purpose of competition law is not to place all undertakings at an equal footing (Petrov, 2020), it is not surprising that the above features, combined with Amazon's substantial market power as an online marketplace (in the EU, especially in Germany and France), its ever-growing role as a gatekeeper for e-commerce, and the economic dependence of independent retailers on Amazon's marketplace[20] (Rinaldi, 2020; Graef, 2019), draw attention of competition authorities to Amazon's market practices.

One could argue that all these characteristics confer a 'special responsibility' on Amazon not to allow its conduct to impair genuine undistorted competition, similarly as holding a dominant position places a special responsibility on the undertaking concerned, the scope of which is considered in the light of the specific circumstances of each case.[21]

[19] European Commission (2020), 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, Press release, 10.11.2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 (accessed on 28.07.2021).

[20] European Commission (2020), 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, Press release, 10.11.2020.

[21] European Commission (2009), Guidance on the Commission's enforcement priorities in applying Article 102 TFEU, para. 9.

Against this background, it can be claimed that Amazon's vertical integration and its dual role creates both the ability and an incentive to engage in potentially abusive modes of conduct, such as favouring its own business (self-preferencing), disadvantaging or discriminating against competing retailers, abusive leveraging or forced free riding (OECD, 2020) with a view to foreclose competitors (Khan, 2017).[22]

Therefore, it should come as no surprise that Amazon's practices are being scrutinised by competition authorities worldwide.[23] The Commission announced that, as part of its in-depth investigation, it will look into whether and how the use of accumulated marketplace seller data, by Amazon acting as a retailer, affects competition (Commission, 2019).

These preliminary concerns are backed by empirical research and complaints of individual sellers on the Amazon marketplace, which have been receiving extensive media coverage for a few years already (Green and Stevens, 2018; Rankin, 2015; Creswell, 2018; Dzieza; Clarke, 2019). Merchants claim that Amazon uses their transactional data it collects as a marketplace in order to identify products that sell well. Once Amazon identifies a successful product, it then either launches its own version of that product and sells it on its marketplace under its private label (such as AmazonBasics), or sells the same product but gives it a more prominent placement on its website (Arcemont, 2020; Höppner and Westerhoff, 2018; see also Bensinger, 2012; Van Dorpe, 2019; Miranda, 2018; Loten and Janofsky, 2015). Thus, Amazon allegedly uses retailer data to introduce its 'copycat' offering and compete against independent retailers, who originally sold these products on Amazon, often undercutting them on price (Höppner and Westerhoff, 2018; Creswell, 2018). Many retailers have become aware of this practice once the sales of their products suddenly dropped and they realised that Amazon introduced its own private label products and gave them a featured placement on the platform. Merchants are aware of this practice but emphasise that they cannot leave Amazon Marketplace without putting at risk the viability of their business – to reach a sufficient number of buyers they have to be present on Amazon. Some authors compare Amazon Marketplace to 'a vast laboratory to spot new products to sell, test sales of potential new goods, and exert more control over pricing' (Bensinger, 2012). There is no doubt that such practices negatively affect retailers, which are placed at a competitive disadvantage – they have

[22] Monopolkommission (2015), Competition policy: The challenge of digital markets, Special Report No 68.

[23] Apart from the Commission, which opened an investigation into Amazon's practices in July 2019, Amazon's conduct has been subject to scrutiny by German, Austrian and Italian competition authorities, as well as the Federal Trade Commission in the US (Palmer, 2020).

to compete with Amazon on the platform upon which the latter unilaterally imposes 'the rules of the game'.

Empirical research also suggests that Amazon uses sales data of its retailers to make business decisions concerning its further vertical integration (that is, which products it should start selling as a retailer) (Bostoen, 2018; see also Soper, 2016; Mattioli, 2020). One study shows that Amazon chooses to vertically integrate in popular ('short-tail') products that have a high sales volume, and leave the unpopular ('long-tail') products to the retailers on its platform (Hagiu and Wright, 2015). It suggests that once Amazon reaches information parity with its sellers, it switches from the marketplace 'to the reseller mode in order to exploit its scale advantage' (Hagiu and Wright, 2015, p. 196). Another research coincides with this thesis and concludes that Amazon is more likely to vertically integrate in products with higher prices, lower shipping costs, and greater demand (Zhu and Liu, 2016). Both studies confirm that Amazon in its role as an online marketplace observes its retailers' sales data and, if a product becomes successful (if sales exceed a certain threshold), it starts selling the relevant products acting as a retailer (Hagiu and Wright, 2015).

Once Amazon enters the market for a particular product and sells it under its private label, it allegedly offers it at a price below that of the original merchant (Khan, 2017). Such a strategy is possible due to Amazon's scale advantages and integrated supply chain (vertical integration) – it does not have to bear the same costs as other retailers do in terms of marketplace or fulfilment fees (Hagiu and Wright, 2015; Zhu and Liu, 2016; Soper, 2016). It is also alleged that then Amazon positions its private label products in a more prominent and visible place on its marketplace[24], often in the so-called 'Buy Box'. Such behaviour may, in turn, drive competing retailers, who do not enjoy comparable advantages, off the market. They would rarely be able to match the price of Amazon's 'copycat', also because they have to pay fees to be able to put their products on sale on Amazon in the first place, and often also use Amazon's fulfilment services (Bensinger, 2012). As rightly noted, since marketplace sellers have to compete with Amazon on its website under its rules (Zhu and Liu, 2016), they are inherently placed at a competitive disadvantage.

In the next section, I will analyse what theory of harm can be applied to Amazon's practices. The discussion below is based on the assumption that Amazon has a dominant position at least in some EU member states.

[24] In that regard, it resembles Google Shopping case, in which the Commission condemned Google's conduct, whereby Google positioned and displayed its own comparison shopping website more favourably than those of its competitors. See: Höppner and Westerhoff, 2018.

III. In search of a suitable theory of harm – (mis)use of competitors' data?

The Commission considers that Amazon's use of non-public marketplace seller data constitutes an abuse of dominance under Article 102 TFEU as it allows Amazon to: (1) avoid the normal risks of retail competition (risks inherent to investing in and launching new products); and (2) leverage its dominance in the market for the provision of marketplace services in France and Germany, which are the biggest markets for Amazon in the EU.[25]

The relatively brief press release does not offer many details on the investigation. In particular, it is not clear what theory of harm the Commission will apply. It is, however, clear that the focus is on the potential anticompetitive effects of Amazon's use (or rather misuse) of third party seller data.

As mentioned above, the Commission has distinguished a separate investigation into the 'Buy Box' and 'Prime Label' practices. The *Buy Box* case seems to be about self-preferencing and discriminating against sellers who do not use its FBA service. Therefore, one can expect that, to some extent, the Commission will rely on its *Google Search (Shopping)* decision,[26] in which it found that Google used its search engine to favour its own comparison shopping service over those of its competitors. In that respect Amazon's conduct, which uses its marketplace to favour its products in the downstream (retail) market over those of competing retailers, is similar to the one pursued by the Commission in the *Google Shopping* case (Graef, 2019).

In the case of the Marketplace investigation, it is more difficult to predict what theory of harm the Commission will apply.[27] Since the *Buy Box* investigation is at least in part about self-preferencing, it can be expected that the focus of the Marketplace investigation will be different.

Given extensive press publications into Amazon's practices, as well as the Commission's announcement that it will 'focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition' and how it helps Amazon to 'avoid the normal risks of retail competition', it seems that the Commission will look at Amazon's use of marketplace sellers' data to launch its private label products at the retailer

[25] European Commission (2020), 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, Press release, 10.11.2020.

[26] Commission Decision of 27.06.2017, Case AT.39740 *Google Search (Shopping)*. The decision was appealed by Google. See: Wakefield, 2020.

[27] In this article it is assumed that the Commission will define a relevant market for Amazon and establish its dominance on it.

level, which copy successful products of competing retailers that sell well on the marketplace. In other words, the Commission will examine how Amazon leverages its data advantage resulting from a privileged (possibly dominant) position in the upstream market (Amazon Marketplace) to launch or improve its competing products in the downstream market (Amazon as online retailer).

The Commission's argument seems to be that by using data of third party sellers, which are also Amazon's competitors, Amazon may exclude them from the market (Bostoen, 2019). As evidenced by numerous press articles and empirical research cited in section two, Amazon tends to launch its private label product, which competes with products originally introduced by third party sellers, and undercuts them on price. Such practice may undermine retailers' incentive to innovate and, by reducing consumer choice, also harm consumer welfare (Bostoen, 2019a).

It should be emphasised that this case is not only about copying competitors' products or placing competing third party sellers at a competitive disadvantage. Neither copying competitors' products, nor placing them at a competitive disadvantage is an antitrust concern (Bostoen, 2019a; Lamadrid, 2019). The power imbalance between third-party sellers and the platform is inherent to digital markets.

However, if copying competitors' products results from: (1) the use of sensitive competitors' data the company has access to due to its dual role as a vertically integrated platform provider, which is both a marketplace operator and a retailer, and (2) benefitting from the economic dependence of third party sellers, who cannot easily switch to competing marketplaces, the assessment of the practice becomes more complex.

It can be argued that under these circumstances, the use of sensitive competitors' data, to copy their products and enter the retail market, may constitute an example of abusive leveraging if it aims at foreclosing competing retailers (OECD, 2020). The platform may use its dominant position in one market (the online marketplace market) to gain a foothold in an adjacent market (the retail market) (Bostoen, 2019a). The negative effect of the practice is further exacerbated by the fact that third party sellers are economically dependent upon Amazon, which is often considered a gatekeeper for e-commerce.[28] Such scenario clearly deviates from permissible 'competition on the merits'.

Since Amazon's conduct will be assessed as a 'by effect' rather than an 'by object' abuse, the Commission will have to demonstrate its anticompetitive

[28] U.S. House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee of the Judiciary (2020), Report on Competition in Digital Markets, available at: https://assets.documentcloud.org/documents/7222833/House-Tech-Antitrust-Report.pdf (accessed on 28.07.2021); Mattioli, 2020.

effects (Bostoen, 2018a). In this case one could argue that Amazon's conduct can diminish innovation efforts of retailers selling on the marketplace. If a platform operator systematically appropriates the investments of third party retailers that depend on the platform for access to consumers, their incentive to come up with new products or to improve existing products diminishes (Bostoen, 2019a; Shelanski, 2013). Thereby, a systemic copycat behaviour can also create a deterrent effect for third party sellers, which may '*pose far greater potential harms to innovation than any exclusionary effect toward existing competitors*' (Obear, 2018, p. 1056).

Obviously, such conduct does not easily fit in with well-established theories of harm and analytical frameworks (Bostoen, 2019a; Khan, 2017; OECD, 2020). In particular, it does not seem convincing to apply such legal standards as refusal to deal or margin squeeze to Amazon's conduct (Reverdin, 2021; Ibáñez Colomo, 2020; Lamadrid, 2019; OECD, 2020). This case is not about refusing to give access to an indispensable input (here: a marketplace) or giving access to it on discriminatory terms. Margin squeeze theories would also be unenforceable as the 'price' imposed on third party sellers (downstream firms) takes the form of competitively sensitive data. In practice, it seems impossible to assess whether this 'price' would foreclose competitors or at least raise prices (or worsen quality) for consumers (OECD, 2020).

Nonetheless, due to the unique characteristics of digital markets (in particular, multi-sidedness, network effects and their dynamic character), as well as new business models and strategies developed by digital market players, it is proposed to develop new theories of harm (OECD, 2020; Shelanski, 2013) that would be 'fit for the digital age'.[29] Some authors and the OECD advocate for the introduction of new types of abuse of dominance that are specifically tailored to digital markets, some of which could be used in the Amazon case.

Amazon's conduct could be regarded as 'forced free-riding' (Shelanski, 2013; OECD, 2020), 'predatory copying' (Obear, 2018) or 'abusive leveraging' (OECD, 2020). Forced free riding takes place 'when a platform appropriates innovation by other firms that depend on the platform for access to consumers' (Shelanski, 2013, p. 1699). It is argued that the potential abuse would arise if the position of the platform, as the transaction facilitator (here: a marketplace) and holder of a significant amount of transaction data, could be used to foreclose competitors (OECD, 2020).

Predatory copying occurs when (1) a predatory firm's market structure plausibly incentivises copying for reasons other than competition on the merits; (2) the alleged copying substantially forecloses competition in the relevant market; and (3) the copying was motivated by exclusionary purposes (Obear,

[29] In analogy to the Commission's strategy 'A Europe fit for the digital age'. See: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en (accessed on 28.07.2021).

2018, p. 1056). Although the framework proposed by Obear was developed to address Facebook's copycat strategy, it could be applied to Amazon's conduct. First, Amazon's dual role as a marketplace and as a retailer plausibly incentivises copying for reasons other than competition on the merits. Second, it seems that the alleged copying may substantially foreclose competition in the relevant (retailer) market, which would have to be examined by the Commission. The fulfilment of the third condition can be questionable, as it may not be easy to prove that Amazon's copying is motivated solely by exclusionary purposes.

Lastly, one could argue that Amazon's practices can be qualified as abusive leveraging (or self-preferencing, if we combine Amazon's conduct in the Marketplace case with the second investigation into Amazon's conduct regarding the Buy Box). This theory of harm also concerns a behaviour of a dominant undertaking active in multiple related markets, but focuses on ways in which a firm can use (or leverage) its dominant position in one market to favour its products in a related market (OECD, 2020). In the case of Amazon, its leveraging takes a slightly different form – Amazon can use its dominant position in one market (here: online marketplace) to enter a related market (retail market) with its copycat offering. Leveraging is made possible not only due to Amazon's vertical integration but also its strategy to use third party seller data to spot successful products and launch its private label products in the retail market. It could constitute a potential exclusionary abuse of dominance, provided it aims at excluding competitors (Khan, 2017).

One cannot fail to notice arguments raised against a theory of harm and antitrust case based on using competitors' data to copy successful products and launch its private label products. It is argued that 'finding business opportunities by replicating what others are doing well is as old as doing business' and 'it is a commonplace practice in the retail sector' (Ibáñez Colomo, 2020). Some authors draw also a parallel between Amazon's conduct and the behaviour of brick-and-mortar supermarkets which introduce private-label brands of popular products (Arcemont, 2020). Supermarkets have used the data of its third-party sellers to enter the market with their own private label brands, and have given them a prominent placement on their shelves, but such practice has never been found illegal under EU competition law (Arcemont, 2020; Nevo and van den Bergh, 2017).

It is true that brick-and-mortar retailers sometimes also launch private label products and may use other brands' sales records to decide on which items to produce (Khan, 2017). However, what is distinctive about Amazon's behaviour is the scale and sophistication of the data collected, as well as the effectiveness of its processing (Khan, 2017). Whereas brick-and-mortar retailers are able to collect general data on sales of particular products, Amazon is able to

carefully monitor buyers' behaviour on the marketplace (that is, what products they are searching for; if they find what they searched for, what products they put in their basket, and which products they take out and why, whether they replace it with a different product) and draw conclusions from it, which go far beyond general data on actual sales. Moreover, Amazon is also more effective in the processing of such data – thanks to its algorithms, it can see not only which products sell well, but also discover market niches or even predict which products will sell well in the future (Khan, 2017). In addition, the difference between Amazon and brick-and-mortar retailers lies also in the economic dependence of third party sellers on the Amazon Marketplace, namely the fact that Amazon is often their main (if not the only) sales channel. The considerable market power that Amazon holds in some markets, and the level of economic dependence of sellers, could not be easily compared to any brick-and-mortar retailer.

Moreover, it is also pointed out that using competitors' data to launch private label products is an expression of competition on the merits and may generally result in lower prices that benefit consumers (Ibáñez Colomo, 2020; Ibáñez Colomo, 2018). Nonetheless, one cannot look solely at price effects in isolation from other effects such practice may have, in particular on innovation. As mentioned above, Amazon's conduct may have a deterrent effect on innovation by third party sellers active on its marketplace. An empirical study by Zhu and Liu finds that 'Amazon's entry discourages affected third-party sellers from subsequently pursuing growth on the platform' and 'could reduce the number of innovative products consumers can find on the site', but at the same time 'it increases product demand and reduces shipping costs for consumers' (Zhu and Liu, 2016).

Apart from harm to innovation, Amazon's practice may also cause harm to consumers in the form of lesser choice. As noted by the European Consumer Organisation (BEUC), which supports the Commission's investigation, it is in the interest of consumers to have a wide choice of sellers, who are also willing to invest in innovation. If sellers are driven out of the market, or if they cannot recover the investments made in innovations, because they are reaped by a competitor (gatekeeper), the choice of sellers will diminish, and so will their incentives to innovate. By reducing consumer choice of products and sellers, as well as the latter's incentives to innovate, Amazon's practices may harm consumers in the medium and long run.[30] The BEUC points also to another interesting aspect of the Amazon investigation, namely the fact that

[30] BEUC supports the European Commission's competition investigation into Amazon's e-commerce activities, 10.11.2020, available at: https://www.beuc.eu/publications/beuc-supports-european-commission%E2%80%99s-competition-investigation-amazon%E2%80%99s-e-commerce/html (accessed on 28.07.2021).

Amazon's practices may unfairly nudge consumers towards Amazon's own products and deprive them of genuine choice, as well as the right to make informed purchases based on what is really best for them and not on what Amazon displays to them as the best option.

Summarising the above discussion, the anticompetitive effect of Amazon's practices may stem from the fact that third party sellers can be driven out off the market and/or lose the incentive to innovate, and consumers may end up with lesser choice than they would have had in the absence of Amazon's conduct. That, in turn, may reduce consumer choice and possibly harm consumer welfare.

Regardless of the theory of harm the Commission will apply, it will be faced with a difficult task of assessing whether potential anticompetitive effects outweigh the procompetitive effects of the practice (Ibáñez Colomo, 2020). The Commission will have to carefully weigh the effects of the practice on price and innovation, as well as other negative or positive effects of the practice on consumers (including the reduction of consumer choice).

Moreover, given that the Commission will have to come up with a new theory of harm, or significantly modify well-established legal standards, it will be also confronted with accusations that new theories of harm may create uncertainty for the incumbents (Akman, 2017; Ibáñez Colomo, 2020; Manne and Wright, 2011). However, the legal uncertainty resulting from applying a new theory of harm should not be an inhibitor to effective enforcement of competition law in cases with clear anticompetitive effects. Moreover, this uncertainty in the case of developing new theories of harm can be partially tackled at the stage of determining an appropriate remedy**.**

If a new theory of harm cannot be easily fit within established legal standards, priority could be given to behavioural remedies (for example, orders to cease a particular conduct) (OECD, 2020; Ibáñez Colomo, 2019). There are several reasons for prioritising behavioural over structural remedies when applying a new theory of harm, including in the case at issue. First, Article 7(1) of Regulation 1/2003[31] provides that structural remedies can only be imposed in the absence of equally effective behavioural remedies or where an equally effective behavioural remedy would be more burdensome than a structural remedy. This provision shows that structural remedies are generally considered to be a stronger intervention than a behavioural remedy in a proceeding based on Article 102 TFEU, and they should not be applied if behavioural remedies can be reasonably assumed to bring an infringement to an end. In the case of Amazon, the most obvious solution would be an order to cease the use of third party seller data to the benefit of Amazon's retail business (a cease-and-desist

[31] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1/1).

order) and a behavioural separation between Amazon's marketplace and retail activities (Bostoen, 2019; Petrov, 2020; Reverdin, 2021). The latter order could be implemented by creating 'firewalls' or 'Chinese walls' between the Amazon Marketplace and Amazon's retail business. Consequently, it seems that in many instances behavioural remedies can achieve their goals without having to reach out for more intrusive structural remedies. Second, applying a new theory of harm to a particular practice always entails a risk of legal uncertainty on part of market participants, and may diminish firms' incentives to invest and innovate (Ibáñez Colomo, 2019). Arguably, the advantage of behavioural remedies over structural ones is that behavioural remedies can mitigate this uncertainty and prevent firms from being discouraged from investing and innovating. The latter is particularly important since incentives to invest and innovate are values that competition policy aims to protect, in particular in digital markets, and are considered more fragile when confronted with structural – usually more intrusive – remedies. Therefore, structural remedies containing positive obligations (such as a structural separation between Amazon's marketplace and retail activities) could be applied if behavioural remedies prove ineffective (which has to be assessed by competent competition authorities). Moreover, structural remedies, if they were to be used at all in digital markets, should rather be reserved for future cases once the new theory of harm becomes more established and is confirmed by the CJEU.

IV. Link to the Commission investigation into Amazon's 'Buy Box'

Misuse of third party seller data is closely linked to the second investigation opened by the Commission, which concerns Amazon's 'Buy Box' and its Prime label. The Commission suspects that Amazon might artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services (so-called 'fulfilment by Amazon' or 'FBA' service). To that end, the Commission will investigate whether the criteria that Amazon sets to choose the winner of the 'Buy Box', and to enable sellers to offer products to Prime users under Amazon's Prime loyalty programme, lead to a preferential treatment of Amazon's retail business or of those sellers that use Amazon's FBA service.

Winning the 'Buy Box' (that is, being selected as the offer that features in this box in response to a consumer query for a certain product) is particularly important for sellers' success. It prominently displays the offer of one selected seller for the searched product, and thereby generates the majority of all sales

for a given product (Lanxner, 2021).[32] In other words, winning the 'Buy Box' directly impacts sellers' sales and profits.[33]

As argued in the literature, online intermediaries have accustomed end users to the most relevant results appearing at the top of the page or being otherwise highlighted on the website (Hoppner, 2021). It creates the so called 'saliency bias' (Bordalo, Gennaioli and Shleifer, 2012) or a default bias (OECD, 2020), which means that consumers are more likely to focus and buy items that are more prominently presented, and ignore those that are less so, although they may be more accurate (a tendency to select more visible or default options) (Hoppner, 2021). In the circumstances of the present case, this also means that a seller who wishes to get access to end users not only has to be present on the Amazon Marketplace but also be found in the 'Buy Box' or in another prominent place. If that is not the case, he may lose sales relative to the entity that wins the 'Buy Box' (possibly one of Amazon's affiliates).

The two investigations are linked as the use of competitors' data allows Amazon to enter the retail market with its 'copycat' products and then prominently display them in the Buy Box. Entering neighbouring markets and competing with third party sellers with its own products would arguably have less negative effects on competition if Amazon were not able to favour its products in the 'Buy Box' and steer consumers towards buying Amazon's products, and not the original ones.

V. Regulation is under way – solution to all problems?

Given the relatively high interest in the Amazon case, the Commission's assessment will spark a debate as to the validity of the measures adopted, in particular, since if it finds an abuse, it will probably not rely on well-established theory of harm (Reverdin, 2021), as discussed in section 3.

The case may also raise wider questions as to the legitimacy of applying competition law, and its ex post perspective, to possibly anticompetitive practices of large online platform providers with considerable economic power – digital gatekeepers. One should notice that digital markets' characteristics (such as multisidedness, network effects and zero-priced services) make the

[32] It is said that 82% of Amazon sales go through the Buy Box, and the percentage is even higher for mobile purchases.

[33] European Commission (2020), 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, Press release, 10.11.2020.

enforcement of Article 102 TFEU extremely difficult, in particular, in terms of establishing a relevant market, dominance and identifying an abuse (Crémer, de Montjoye and Schweitzer, 2019). The abuse of dominance enforcement as we know it may not be able to effectively address every potential competition problem that may arise in such markets (OECD, 2020), also because of its ex post perspective and generally lengthy proceedings (Crémer, de Montjoye and Schweitzer, 2019; Furman, Coyle, Fletcher, McAuley and Marsden, 2019). Since digital markets are inherently dynamic, and market conditions tend to change quickly, policy response should also be adjusted to this dynamics. There may be cases where an abuse of dominance framework may apply, but alternative policy tools could tackle the concerns more efficiently (OECD, 2020).

Thus, it has been advocated by various scholars and policymakers to introduce a regulatory framework, which adopts an ex ante perspective, and imposes certain obligations on the biggest digital market players (Crémer, de Montjoye and Schweitzer, 2019; Graef, 2019; Rinaldi, 2020) that have a 'strategic market status' (Furman et al., 2019, p. 12). They point out that to build consumer choice and competition into digital markets, it is crucial to introduce a regulatory regime that can increase the competitiveness and contestability of digital markets ex ante. Ex ante enforcement of a detailed set of rules should help to prevent negative outcomes before they occur, and before it is too late for the parties involved (Furman et al., 2019, p. 62–63). Such approach would also prevent legal uncertainty arising from using new theories of harm by competition authorities acting ex post.

The Commission responded to these suggestions and in December 2020 proposed the Digital Services Act package. It consists of the proposal for the Digital Services Act (hereinafter: draft DSA),[34] which lays down harmonised rules on the provision of digital services, and the proposal for the Digital Markets Act (hereinafter: draft DMA),[35] which aims to ensure contestable and fair markets in the digital sector where gatekeepers are present. The latter proposal is obviously of interest to this article.

The draft DMA focuses on the so-called 'core platform services', which are provided or offered by gatekeepers. Core platform services include online

[34] Proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15.12.2020, available at: https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-european-parliament-and-council-single-market-digital-services-digital (accessed on 28.07.2021).

[35] Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15.12.2020, available at: https://eur-lex.europa.eu/legal-content/en/txt/?uri=com%3a2020%3a842%3afin (accessed on 29.07.2021).

intermediation services,[36] such as marketplaces. The Commission explains that 'core platform services in scope are only those where there is strong evidence of (i) high concentration, where usually one or very few large online platforms set the commercial conditions with considerable autonomy from their (potential) challengers, customers or consumers; (ii) dependence on a few large online platforms acting as gateways for business users to reach and have interactions with their customers; and (iii) the power by core platform service providers often being misused by means of unfair behavior vis-à-vis economically dependent business users and customers", i.e. those digital services "where, based on current conditions, concerns about weak contestability and unfair practices by gatekeepers are more apparent and pressing from an internal market perspective' (draft DMA, 2020, p. 5–6).

The DMA will apply not to all providers of core platform services but only to those providers that meet clearly defined quantitative and qualitative criteria for being designated as a gatekeeper by the Commission (Article 3 draft DMA). The main goal of the DMA is to impose specific obligations on gatekeepers that should prevent them from engaging in practices (i) that are particularly unfair or harmful, (ii) which can be identified in a clear and unambiguous manner to provide the necessary legal certainty for gatekeepers and other interested parties, and (iii) for which there is sufficient experience. Thus, the Commission selected only those practices that are considered unfair by taking into account the features of the digital sector and where experience gained, for example in the enforcement of EU competition rules, shows that they have a particularly negative direct impact on business users and end users (recital 33 draft DMA).

If we apply the proposed framework to Amazon, it turns out that Amazon's Marketplace and 'Buy Box' practices would be caught by the DMA's regime. First, Amazon's marketplace service is an online intermediation service which would qualify as a core platform service within the meaning proposed in the draft DMA. Second, Amazon as a provider of core platform services would most probably be designated as a gatekeeper by the Commission, in line with provisions laid down in Article 3 draft DMA.[37] It can be assumed that Amazon has a significant impact on the internal market, it operates a core platform

[36] Online intermediation services are services as defined in Art. 2(2) of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, also known as the Platform to Business Regulation (OJ 2019 L 186/57).

[37] Amazon is regarded as a gatekeeper for e-commerce also in the US. See: U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law (2020), Report on Competition in Digital Markets, available at: https://assets.documentcloud.org/documents/7222833/House-Tech-Antitrust-Report.pdf (accessed on 29.07.2021), United States, 2020.

service which serves as an important gateway for business users to reach end users; and it enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future (Article 3(1) draft DMA).

Third, amongst types of conduct which are perceived by the Commission to be particularly unfair or harmful, and would be prohibited by Articles 5 and 6 draft DMA, are Amazon's practices which are currently being investigated by the Commission in the cases discussed above. The draft DMA foresees that gatekeeper shall 'refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users' (Article 6(1)(a) draft DMA) and 'refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking' (Article 6(1)(d) draft DMA). Evidently, the first obligation relates to Amazon's Marketplace conduct and the second one – to Amazon's Buy Box practices. If the DMA was in place, the Commission's investigations into Amazon's practices under EU competition law would be unnecessary. One can reasonably expect that the obligations laid down in the proposal would prevent the emergence of such practice in the first place.

Nonetheless, a regulation such as DMA should not be perceived as a substitute for competition law enforcement. Competition law, with its broad, open and general rules, is still a flexible tool that has generally 'allowed to prominently address the novel phenomena of the digital era and novel positions of power' (Crémer, de Montjoye and Schweitzer, 2019, p. 52). Therefore, regulation and competition law should rather be seen as complementary regimes that reinforce each other and together are better suited to address challenges arising for competition policy in digital markets (Crémer, de Montjoye and Schweitzer, 2019; Furman et al., 2019).

VI. Conclusion

Amazon's use of sensitive data from independent retailers who sell on its marketplace may raise anticompetitive concerns. If Amazon uses its privileged position, resulting from its vertical integration and the economic dependence of third party sellers on its Marketplace, to gather competitively sensitive data

and introduce a private label of products that sell well on the marketplace, anticompetitive concerns may arise. Anticompetitive effects of Amazon's practice may lie in the fact that, as a result of Amazon's strategic copying, third party sellers can be driven out off the market or at least lose the incentive to innovate. Consequently, consumers may end up with less choice and less innovation than they could have had in absence of Amazon's conduct.

However, Amazon's conduct, which is being investigated by the Commission, does not easily fit in with well-established theories of harm. Therefore, it is proposed to develop new theories of harm that would be specifically tailored to deal with the challenges of digital markets and online platforms' business models. It is argued that enforcement of competition rules in digital markets requires certain flexibility. Amazon's conduct could be regarded as: forced free-riding (Shelanski, 2013; OECD, 2020), predatory copying (Obear, 2018), abusive leveraging (OECD, 2020) or, if we assess Amazon's Marketplace conduct together with its 'Buy Box' practices, as self-preferencing.

Obviously, a departure from well-known legal standards of assessment may create uncertainty for online platform providers and be prone to enforcement errors (OECD, 2020; Reverdin, 2021). However, one should not sit back and idly wait for appropriate standards to develop. If there are convincing reasons to consider that a given market behaviour may lead to anticompetitive effects (such as: foreclosure of competitors, stifling innovation, decrease of consumer choice), competition authorities should pursue it, even if such conduct has not been previously assessed and does not easily fit in with any established legal standards. Moreover, it should be observed that prevailing legal standards of antitrust assessment have been developed by the decision making practice of the Commission and the case law of the CJEU, which at certain point decided to deviate from the well-known enforcement path. In that respect, it is worth recalling the view of Obear, who stated that 'when it comes to protecting innovation in the markets, courts should not be afraid of a little bit of innovation in the law' (Obear, 2018, p. 1059).

The Amazon Marketplace case reveals that the enforcement of Article 102 TFEU may become difficult when confronted with novel market practices and the characteristics of digital markets (such as their multisidedness, network effects and zero-priced services). Abuse of dominance enforcement as we know it may not be able to effectively address every potential competition problem that may arise in such markets. Given the uncertainty inherent to antitrust assessment and the risk of enforcement errors, one should advocate for introducing a sector specific regulation targeted at the largest digital players – the gatekeepers, such as the DMA. The DMA would expressly prohibit practices such as those applied by Amazon. Ex ante regulation would, to some extent, counteract ex post enforcement of competition rules that

could be seen as unpredictable. Knowing the obligations in advance could help gatekeepers to abide by them and avoid antitrust scrutiny.

Nonetheless, a regulation such as the DMA should not be perceived as a substitute for competition law enforcement. Competition law, with its broad, open and general rules, is still a flexible tool to address new anticompetitive practices that may arise in digital markets (Crémer, de Montjoye and Schweitzer, 2019, p. 52). On the one hand, regulation such as the DMA with its ex ante perspective can diminish the risk that gatekeepers will engage in the prohibited practices. On the other hand, competition law – applied ex post – can address competition problems that are not covered by regulation. Therefore, regulation and competition law should rather be seen as complementary regimes which reinforce each other and together are better suited to address challenges arising for competition policy in digital markets (Crémer, de Montjoye and Schweitzer, 2019; Furman et al., 2019). Applied simultaneously and not alternatively, competition law and regulation will help to avoid legal loopholes and provide more comprehensive protection to competition in digital markets.

Literature

Akman, P. (2017). The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law, *Journal of Law, Technology and Policy* 2, 301–374, https://doi.org/10.2139/ssrn.2811789.

Arcemont, M. (2020). The Many Roles of Amazon: The European Commission's Antitrust Investigation into Amazon's "Buy Box" Competition. Retrieved from: https://smulawjournals.org/ilra/2020/04/18/the-many-roles-of-amazon-the-european-commissions-antitrust-investigation-into-amazons-buy-box-competition/.

Bensinger, G. (2012). Competing With Amazon on Amazon, *The Wall Street Journal*, 27 June 2012. Retrieved from: https://www.wsj.com/articles/SB10001424052702304441404577482902055882264.

BEUC (2020). BEUC supports European Commission's competition investigation into Amazon's e-commerce activities. Retrieved from: https://www.beuc.eu/publications/beuc-supports-european-commission%E2%80%99s-competition-investigation-amazon%E2%80%99s-e-commerce/html.

Bordalo, P. et al. (2012). Salience theory of choice under risk, *The Quarterly Journal of Economics*, *127*(3), 1243-1285, https://doi.org/10.1093/qje/qjs018.

Bostoen, F. (2018). Online platforms and vertical integration: the return of margin squeeze?, *Journal of Antitrust Enforcement*, *6*(3), 355–381, https://doi.org/10.1093/jaenfo/jny006.

Bostoen, F. (2018). The Commission's Amazon probe: overcoming the antitrust paradox, CoRe Blog, 28 September 2018. Retrieved from: https://coreblog.lexxion.eu/amazon-probe/.

Bostoen, F. (2019). Amazon cases on the move: Bundeskartellamt closes proceedings while European Commission opens formal investigation, CoRe Blog, 12 November 2019. Retrieved from: https://www.lexxion.eu/en/coreblogpost/amazon-cases-on-the-move/.

Bostoen, F. (2019). We have reached "peak cloning" in Silicon Valley': when does copying your competitor's product become anticompetitive?, CoRe Blog, 26 September 2019. Retrieved from: https://www.lexxion.eu/en/coreblogpost/anticompetitive-copying/.

Bourreau, M., de Streel, A. (2019). Digital Conglomerates and EU Competition Policy. Retrieved from: http://www.crid.be/pdf/public/8377.pdf.

Clarke, L. (2019). The EU's latest antitrust probe could hit Amazon where it hurts, Wired, 18 July 2019. Retrieved from: https://www.wired.co.uk/article/amazon-eu-competition-marketplace-analysis.

Crémer, J. et al. (2019). *Competition Policy for the digital era, Final report*, Luxembourg: Publications Office of the European Union.

Creswell, J. (2018). How Amazon Steers Shoppers to Its Own Products, The New York Times, 23 June 2018. Retrieved from: https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html.

Dzieza, J. (2018). Prime and Punishment – Dirty Dealing in $175 billion Amazon Marketplace, The Verge, 19 December 2018, Retrieved from: https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement.

European Commission (2019). Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon, Press release, 17 July 2019. Retrieved from: http://europa.eu/rapid/press-release_IP-19-4291_en.htm.

European Commission (2020). 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, Press release, 10 November 2020. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

Furman, J. et al. (2019). Unlocking Digital Competition, Report of the Digital Competition Expert Panel. Retrieved from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

Graef, I. (2019). Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence, *Yearbook of European Law*, 38, 448–499, https://doi.org/10.1093/yel/yez008.

Greene, J., Stevens, L. (2018). You're Stupid If You Don't Get Scared': When Amazon Goes From Partner to Rival, Wall Street Journal, 1 June 2018. Retrieved from: https://www.wsj.com/articles/how-amazon-wins-1527845402.

Green, D. (2019). Amazon says its private labels are only 1% of its business, but new data shows some are seeing huge growth, 24 April 2019. Retrieved from: https://www.businessinsider.com/amazon-private-labels-some-grow-quickly-data-shows-2019-4?IR=T.

Hagiu, A., Wright, J. (2015). Marketplace or Reseller?, *Management Science*, *61*(1), 184–203, http://dx.doi.org/10.1287/mnsc.2014.2042.

Höppner, T., Westerhoff, P. (2018). The EU's competition investigation into Amazon Marketplace, Kluwer Competition Law Blog, 30 November 2018. Retrieved from: http://competitionlawblog.kluwercompetitionlaw.com/2018/11/30/the-eus-competition-investigation-into-amazon-marketplace/.

Hoppner, T. (2021). Gatekeepers' Tollbooths for Market Access: How to Safeguard Unbiased Intermediation, *CPI Antitrust Chronicles* – February 2021.

Ibáñez Colomo, P. (2018). On the Amazon probe: neutrality everywhere (or the rise of common carrier antitrust), 25 September 2018. Retrieved from: https://

chillingcompetition.com/2018/09/25/on-the-amazon-probe-neutrality-everywhere-or-the-rise-of-common-carrier-antitrust/.

Ibáñez Colomo, P. (2019). Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping, *European Competition Law & Practice*, *10*(9), 532–551, https://doi.org/10.1093/jeclap/lpz077.

Ibáñez Colomo, P. (2020). The Commission sends Amazon an SO: the rise of common carrier antitrust, 10 November 2020. Retrieved from: https://chillingcompetition.com/2020/11/10/the-commission-sends-amazon-an-so-the-rise-of-common-carrier-antitrust/.

Kabiri, N., Helm, L. (2018). The Rise of Amazon's Private Label Brands. Retrieved from: https://seattlebusinessmag.com/business-operations/rise-amazons-private-label-brands

Khan, L.M. (2017). Amazon's Antitrust Paradox, *The Yale Law Journal*, 710–805.

Khan, L.M. (2018). Amazon – An Infrastructure Service and Its Challenge to Current Antitrust Law, in: M. Moore, D. Tambini (eds.), *Digital Dominance, The Power of Google, Amazon, Facebook, and Apple*. Oxford: Oxford University Press, 98–131.

Lamadrid, A. (2019). The Amazon Investigation: A Prime Example of Contemporary Antitrust, 19 July 2019. Retrieved from: https://chillingcompetition.com/2019/07/19/the-amazon-investigation-a-prime-example-of-contemporary-antitrust/.

Manne, G., Wright, J. (2011). Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google, *Harvard Journal of Law and Public Policy*, *34*(1).

Monopolkommission (2015). Competition policy: The challenge of digital markets, Special Report No 68 Retrieved from: https://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf.

Nevo, H., van den Bergh, R. (2017). Private Labels: Challenges for Competition Law and Economics, *World Competition*, *4*(2), 271–298.

Obear, J. (2019). Move Last and Take Things: Facebook and Predatory Copying. *Columbia Business Law Review*, 3, 994–1059, https://doi.org/10.7916/cblr.v2018i3.1710.

OECD (2020). Abuse of Dominance in Digital Markets. Retrieved from: http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.

Petit, N. (2016). Technology Giants: The "Moligopoly" Hypothesis and Holistic Competition: A Primer, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2856502.

Petrov, P. (2020). The European Commission Investigations Against Amazon – A Gatekeeper Saga, Kluwer Competition Law Blog, 18 December 2020. Retrieved from: http://competitionlawblog.kluwercompetitionlaw.com/2020/12/18/the-european-commission-investigations-against-amazon-a-gatekeeper-saga/.

Rankin, J. (2015). Third-party sellers and Amazon – a double-edged sword in e-commerce, The Guardian, 23 June 2015. Retrieved from: https://www.theguardian.com/technology/2015/jun/23/amazon-marketplace-third-party-seller-faustian-pact.

Reverdin, V.M.K. (2021). Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU?, *Journal of European Competition Law & Practice*, *12*(3), 189-199 https://doi.org/10.1093/jeclap/lpab016.

Rinaldi, A. (2020). Re-imagining the Abuse of Economic Dependence in a Digital World, CoRe Blog, 9 June 2020. Retrieved from: https://www.lexxion.eu/coreblogpost/re-imagining-the-abuse-of-economic-dependence-in-a-digital-world/.

Soper, S. (2016). Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too, Bloomberg, 20 April 2016. Retrieved from: https://www.bloomberg.com/news/articles/2016-04-20/got-a-hot-seller-on-amazon-prepare-for-e-tailer-to-make-one-too.

Sorkin, A.R. (2017). Conglomerates Didn't Die. They Look Like Amazon, The New York Times 19 June 2017. Retrieved from: https://www.nytimes.com/2017/06/19/business/dealbook/amazon-conglomerate.html.

Toplensky, R., Bond, S. (2018). EU opens probe into Amazon use of data about merchants, Financial Times, 19 September 2018. Retrieved from: https://www.ft.com/content/a8c78888-bc0f-11e8-8274-55b72926558f.

Van Dorpe, S. (2019). The case against Amazon, Politico, 4 March 2019. Retrieved from: https://www.politico.eu/article/amazon-europe-competition-giveth-and-amazon-taketh-away/.

Vezzoso, S. (2018). Amazon and the Law of The Jungle, *CPI Antitrust Chronicle*, December 2018, 1–6.

Zhu, F., Liu, Q. (2016). Competing With Complementors: An Empirical Look At Amazon.com, *Harvard Business School Working Paper* 15-044, https://doi.org/10.2139/ssrn.2533616.