

Blog Highlight

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The Commission's Amazon Probe: Overcoming the Antitrust Paradox

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In a press conference on 19 September 2018, EU Commissioner for Competition Margrethe Vestager announced a preliminary investigation into Amazon.¹ At the heart of the potentially abusive conduct is Amazon's 'dual role'. On the one hand, Amazon offers a marketplace for third-party sellers to offer their products to consumers. On the other hand, Amazon offers its own products through its marketplace. The Commission's allegation appears to be that Amazon uses the data it gathers on third-party transactions to boost the sales of its own products. In this short note, I examine where the investigation is coming from, where it may be headed, and which related developments can influence it.

I. Where Is the Investigation Coming From?

As to the origin of the investigation, Vestager noted that the conduct in question was first observed in the Commission's E-Commerce Sector Inquiry. Indeed, in a staff working document accompanying last year's final report on the inquiry, the Commission noted:

Marketplace operators sometimes act as an online retailer on their platform in direct competition with third party sellers. Competitively sensitive data provided by third party sellers to marketplaces or generated on marketplaces in relation to third-party transactions (e.g. bestsellers, transactional prices and pricing plans, inventory levels, supplier data) could – absent any safeguards in place – be used in order to boost the retail activities of the marketplace operators at the expense of third party sellers.²

The Commission already concluded at the time that such behavior could potentially raise competition concerns.

However, there is an additional reason for investigating Amazon's conduct. According to Vestager,

'it's also what a lot of people are talking about'. That is no overstatement. The last two years have seen a series of news articles raising concerns about Amazon's dual role on its platform.³ Those articles have two recurring themes.

Firstly, they use the example of a well-reviewed laptop stand sold on Amazon Marketplace by the company Rain. Amazon allegedly copied the laptop stand, and then started selling it at a lower price while also giving it more favourable placement in its prod-

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1 Margrethe Vestager, 'Press conference on Luxembourg McDonalds' State Aid case' (video, 19 September 2019) <<https://bit.ly/2r3xDfB>> accessed 23 November 2018. While the McDonalds' State Aid case was the reason for the press conference, the Commissioner—prompted by a journalist—dedicated two and a half minutes to discussing the Amazon probe.

2 European Commission, 'Report from the Commission to the Council and the European Parliament: Final report on the E-commerce Sector Inquiry' (Staff Working Document) SWD(2017)154, para 651.

3 Jennifer Rankin, 'Third-party sellers and Amazon - a double-edged sword in e-commerce' (*The Guardian*, 23 June 2015) <<https://www.theguardian.com/technology/2015/jun/23/amazon-marketplace-third-party-seller-faustian-pact>> accessed 23 November 2018; Spencer Soper, 'Got a Hot Seller on Amazon?

uct listing. Secondly—and more fundamentally—they cite Lina Khan, Director of Legal Policy at the Open Markets Institute.

Lina Khan has been shaking up antitrust circles since the publication of her article ‘Amazon’s Antitrust Paradox’ in the Yale Law Journal last year.⁴ In a nearly 100-page article discussing (US) antitrust law’s failure to capture anti-competitive conduct by Amazon, she devotes four pages to Amazon’s exploitation of the data collected on its marketplace.⁵

In those pages, Khan diagnoses the problem the Commission appears to be looking at. Amazon is vertically integrated in the sense that it offers not only the infrastructure for the commerce of third parties, but also offer its own products through this infrastructure. It uses the vast sales data it gathers on its platform to guide which product spaces to enter, and then pushes out competitors by undercutting them on price and/or giving its own items featured placement.

The question, however, is whether this diagnosis is correct, and if so, what the remedy is.

II. Where Is the Investigation Headed?

Vestager stressed that the investigation is in its ‘very early days’. She acknowledges that Amazon’s use of data can be perfectly legitimate when used to improve its service to third party sellers. However, she is concerned that Amazon uses also uses this data for its calculations as to ‘what is the new big thing, what

is it that people want, what kind of offers do they like to receive, what makes them buy things’. To find out, the Commission has sent questionnaires to third party sellers on Amazon Marketplace.⁶

1. Dominance

This shapes up to be an abuse of dominance case under Article 102 TFEU, so the Commission will have to define Amazon’s market and establish its dominant position on it. As Amazon Marketplace operates a two-sided market, connecting consumers with sellers (the ‘sides’ of the market), market definition is not a straightforward exercise: do we define separate markets for each side, or one intermediation market?⁷

When looking at Amazon’s price parity clauses in 2013, the Bundeskartellamt chose the latter option, defining the market as that for ‘B2C online platform services for the sale of a general product range’, excluding auction platforms and price comparison engines.⁸ There are, however, no publicly available sources on Amazon’s share in this market.

2. Theory of Harm

If the Commission finds dominance, it will need a credible theory of harm, which is—again—no easy feat. It may draw inspiration from its *Google Search* decision, where it found that Google used its search

Prepare for E-Tailer to Make One Too’ (*Bloomberg*, 20 April 2016) <<https://www.bloomberg.com/news/articles/2016-04-20/got-a-hot-seller-on-amazon-prepare-for-e-tailer-to-make-one-too>> accessed 23 November 2018; Olivia Solon and Julia Carrie Wong, ‘Jeff Bezos v the world: why all companies fear ‘death by Amazon’’ (*The Guardian*, 24 April 2018) <<https://www.theguardian.com/technology/2018/apr/24/amazon-jeff-bezos-customer-data-industries>> accessed 23 November 2018; Jay Greene and Laura Stevens, ‘“You’re Stupid If You Don’t Get Scared”: When Amazon Goes From Partner to Rival’ (*The Wall Street Journal*, 1 June 2018) <<https://www.wsj.com/articles/how-amazon-wins-1527845402>> accessed 23 November 2018; Leticia Miranda, ‘Amazon Sellers Say The Tech Giant Is Crushing Them With Competitive Pricing’ (*BuzzFeed News*, 7 June 2018) <<https://www.buzzfeednews.com/article/leticiamiranda/amazon-sellers-say-the-tech-giant-is-crushing-them-with-jdyrW1KZj>> accessed 23 November 2018; Julia Creswell, ‘How Amazon Steers Shoppers to Its Own Products’ (*The New York Times*, 23 June 2018) <<https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>> accessed 23 November 2018.

4 David Streitfeld, ‘Amazon’s Antitrust Antagonist Has a Break-through Idea’ (*The New York Times*, 7 September 2018) <<https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>> accessed 23 November 2018.

5 Lina Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 Yale Law Journal 710, 780-3.

6 The German version of the questionnaire was posted online, see <https://www.wortfilter.de/wp/wp-content/uploads/2018/09/Fragebogen_Amazon_EU_Kommission.pdf> accessed 23 November 2018.

7 See eg Daniel Mandrescu, ‘Market definition for two-(or multi)-sided platforms – demand interdependence and substitution as guiding principles’ (*CoRe Blog*, 18 September 2018) <<https://coreblog.lexxion.eu/demand-interdependency-and-substitution-the-guiding-principles-for-future-cases-concerning-market-definitions-for-two-or-multi-sided-platforms/>> accessed 23 November 2018.

8 Bundeskartellamt, ‘Amazon removes price parity obligation for retailers on its Marketplace platform’ (case report, 9 December 2013) <<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.html>> accessed 23 November 2018.

engine to favour its own comparison shopping services over those of third parties.⁹ As Amazon is also said to use its platform to favour its products in the downstream market, its conduct is similar. The Commission's argument then goes that excluding third parties reduces both innovation and consumer choice. Amazon will undoubtedly counter that its conduct lowers prices.

However, the Commission may want to look further back for precedent (especially as its *Google Search* decision is being challenged before the General Court¹⁰). Exclusion of downstream competitors by vertically integrated undertakings—in particular telecom operators—was at the heart of the margin squeeze cases that ran throughout the 2000s. Yours truly has argued this assessment framework may also be applicable to exclusionary conduct of online platforms.¹¹

3. Supporting Data

In any case, the Commission has some data to work with. Hagiu and Wright have empirically tested Amazon's process of vertical integration, noting 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.'¹² They find that Amazon particularly starts selling short-tail products. Zhu and Liu confirm that Amazon targets products with greater demand, and add that higher prices and lower shipping costs also guide the process.¹³

Zhu and Liu have also empirically analyzed the effects of Amazon's entry into third-party sellers' product spaces. They find that 'Amazon's entry discourages affected third-party sellers from subsequently pursuing growth on the platform, [but] increases product demand and reduces shipping costs for consumers.'¹⁴ Other research finds that Amazon's algorithmic steering practices may lead consumers to pay more, although this is mostly limited to consumers who do not subscribe to Amazon's Prime service.¹⁵

While helpful, these results are far from conclusive. Given that Amazon's conduct will be assessed as a 'by effect' rather than an 'by object' abuse, the Commission will have to demonstrate its anti-competitive consequences. Moreover, it will have to come up with an effective remedy. A behavioural separation between Amazon's marketplace and retail activities is the most obvious solution. However, given the

criticism on such remedy in the *Google Search* case,¹⁶ some might be more drawn to a structural separation.

III. Related Developments

The Commission's probe targets *one* platform-to-business relation. However, the Commission has recently also adopted a proposal to regulate such relations *generally*.¹⁷ As explained in a previous CoRe Blog post, the regulation would oblige platforms to be transparent regarding any differentiated treatment between the platform and its business users when it comes to access to data and rankings of search results.¹⁸

Finally, the Commission does not appear to be the only authority concerned about Amazon's practices. MLex reported that Amazon's dual role has also caught the eye of German antitrust enforcers.¹⁹ Finally, Capitol Forum—a US news service focused on

9 *Google Search (Shopping)* (Case AT.39740) Commission Decision.

10 Daniel Boffey, 'Google appeals against EU's €2.4bn fine over search engine results' (*The Guardian*, 11 September 2017) <<https://www.theguardian.com/technology/2017/sep/11/google-appeals-eu-fine-search-engine-results-shopping-service>> accessed 23 November 2018.

11 Friso Bostoen, 'Online platforms and vertical integration: the return of margin squeeze?' (2018) *Journal of Antitrust Enforcement* (pre-publication), see 20-1 on Amazon specifically.

12 Andrei Hagiu and Julian Wright, 'Marketplace or Reseller?' (2015) 61 *Management Science* 184, 197.

13 Feng Zhu and Qihong Liu, 'Competing with complementors: An empirical look at Amazon.com' (2018) 39 *Strategic Management Journal* 2618, 2630.

14 *ibid* 2618.

15 Julia Angwin and Surya Mattu, 'Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't' (*ProPublica*, 20 September 2016) <<https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt>> accessed 23 November 2018.

16 Foundem et al, Open letter to Commissioner Vestager re: AT.39740 – *Google Search (Comparison Shopping)*, 28 February 2018 <http://www.foundem.co.uk/Open_Letter_Commissioner_Vestager_Feb_2018.pdf> accessed 23 November 2018.

17 European Commission, Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services (Proposal) COM(2018)238.

18 Friso Bostoen, 'The Commission proposes a Regulation on platform-to-business trading practices' (*CoRe Blog*, 25 May 2018) <<https://coreblog.lexxion.eu/the-commission-proposes-a-regulation-on-platform-to-business-trading-practices/>> accessed 23 November 2018.

19 The original source is restricted, but for a second-hand account, see <<https://twitter.com/MGRoseATRS/status/1011949498166317056>> accessed 23 November 2018.

antitrust—has also investigated how Amazon favours its own products, and concluded that this

conduct risks antitrust enforcement by the Trump administration.²⁰

20 'Amazon: By Prioritizing its Own Fashion Label Brands in Product Placement on its Increasingly Dominant Platform, Amazon Risks Antitrust Enforcement by a Trump Administration' (*Capitol Forum*,

13 December 2016) <<https://thecapitolforum.com/wp-content/uploads/2016/07/Amazon-2016.12.13.pdf>> accessed 23 November 2018.