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The Amazon Market Place case: The risks of being a judge and party

O caso Amazon Market Place: os riscos de ser juiz e parte

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ABSTRACT: A common feature of dominant digital platforms is that they are integrated into a plurality of business lines, including the markets they organise or connect, so that they operate a platform and market their own goods and services on it. This dual role played by platforms in various digital markets, acting simultaneously as intermediaries and providers, has raised fears that it may be exploited by platforms to further entrench their dominance, frustrate competition and stifle innovation. Despite the introduction of novel terms, such as self-preferencing, we are actually facing a classic conflict of interest that can be addressed from different branches of the legal system.

KEY WORDS: Self-preferencing; platform; vertical integration; gatekeeper; Amazon.

RESUMO: Uma característica comum das plataformas digitais dominantes é que estão integradas numa pluralidade de linhas de negócios, incluindo os mercados que organizam ou conectam, operando uma plataforma e comercializando nela os seus próprios produtos e serviços. Esse duplo papel desempenhado pelas plataformas em vários mercados digitais, atuando simultaneamente como intermediários e fornecedores de bens e prestadores de serviços, levantou receios de que possa ser explorado pelas plataformas para consolidar ainda mais o seu domínio, restringir a concorrência e sufocar a inovação. Apesar da introdução de novos termos, como autopreferência, na verdade, estamos diante de um clássico conflito de interesses que pode ser tratado a partir de diferentes ramos do sistema jurídico.

PALAVRAS-CHAVE: Autopreferência; plataforma; integração vertical; gatekeeper; Amazon.

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1. The platform economy

Digital markets are the new favourite sector and the focus of the concerns of national and supranational competition authorities. The degree of concentration reached in these markets, with the formation and consolidation of technological giants has unleashed a social and political movement warning of the negative implications for consumers, economic agents and the economy in general. It has been revived an old debate on the risks of private economic power, which extends its pernicious effects not only to the deterioration of the competitive process, but also to the growing increase in economic and social inequalities and even to the very affectation of political democracy.

Although they are not the only markets with a tendency towards concentration, the special characteristics of the digital economy and its agents, such as its ubiquity and progressive extension to a plurality of sectors, or the lack of confidence in its capacity for renewal at the impulse of innovation, have determined an unprecedented response, both to its own structural configuration and to the conduct of large technology operators, by competition authorities and regulators in all jurisdictions.

When we first began to talk about the digital economy, this concept was more limited and confined to transactions or exchanges of goods and services through e-commerce. But digitalisation has extended its frontiers, disruptively reaching other traditional markets and sectors (tourism, the information industry, mass media, transport, social relations, etc.), modelling and redirecting the way companies do business, the way they interact with consumers and the competitive structure of these markets.

Although the potential scope of the digital economy is therefore enormous, in the context of competition law digital markets tend to refer primarily to the following: online intermediation platforms (including app shops and intermediation in other sectors); search engines; Internet browsers; social networking and social media; operating systems; cloud computing; voice assistants; and digital advertising.[1]

One of the defining characteristics of these markets, from the perspective of their structural make-up, is the presence of a new type of company or business model: platforms. Many of these markets tend to be structured on the basis of platforms, falling within what are known as *two-sided* or *multisided markets*. These markets are characterised by the existence of a platform company that connects two different groups (professionals and consumers), selling or offering two or more products or services to the two groups of customers, with indirectly related demands. In this sense, the value obtained by one side of the demand increases as the number of consumers on the other side increases (indirect network effects). This may lead the platform to opt for pricing strategies, based on the economic value of the data, that allow the more price-sensitive side to be subsidised by the more size-sensitive side on the other side

[1] See Recital 14 of the REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (*Digital Markets Act or DMA*).

of the market (*freemium* strategies). Only through intermediary platforms will each demand side be able to access the other side, hence the use of the terms "gatekeepers" or "bottlenecks" to refer to the position of platforms in these markets.[2]

Another feature of digital markets is the importance of data or information (*Big Data*). Many of the platforms base their business model precisely on the collection and commercial use of personal data or information. Data is of enormous value from a strategic perspective because it enables companies to obtain a better knowledge of the customer and to make forecasts about their behaviour, which allows them to improve existing products and services, as well as to exploit new business opportunities. In turn, the extraction of specific knowledge enables customer segmentation and facilitates more personalised recommendations or advertising campaigns.

In addition, the data provides a company with an overview of the state of competition in the markets in which it operates. In this way, a company can more quickly spot rivals that may become a threat and acquire them when they are still at a very early stage of development. Moreover, as we will have the opportunity to analyse, a platform can access all the information produced in its ecosystem, gaining more knowledge than its own professional users of the markets in which they operate, which may encourage or facilitate certain behaviours that have raised concerns from a competition perspective. For example, platforms may limit access to data generated by professional users or their clients in order to gain a competitive advantage or use sensitive information generated by their professional users within their platform for their own benefit.

Finally, from a structural perspective, digital markets are characterised by the concentration of activity in the hands of very few firms. Several economic factors explain the existence of these high market shares, such as economies of scale, high initial fixed costs and, especially, the presence of direct and indirect network effects. While these can be seen as a destabilising element of previous market power positions, they can also be a factor leading to market concentration and the erection of entry barriers. Indeed, two-sided markets tend to be highly concentrated markets with natural oligopolistic characteristics and high entry costs, as a consequence of the need to develop both sides of the market in order to compete. These markets also carry an implicit structural risk as they are subject to the *winner-takes-it-all* problem that usually arises when the value of the network and the costs of multi-connection are very high and demand differentiation among users is lower.[3]

[2] For a classification of the different types or categories of two-sided markets, see NICK SRNICEK, *Platform Capitalism*, Polity, Cambridge, 2017, pp. 48 ff.
[3] On the characteristics of digital markets, see ARIEL ERZRACHI/MAURICE STUCKE, *Virtual Competition. The Problems and Perils of the Algorithm-Driven Economy*, Cambridge, Harvard University Press, 2016.

2. Dual role of some of the big digital platforms: The Amazon Market Place case

While the competition risks associated with the conduct and policies of large technology platforms are very diverse, one of the main concerns of competition authorities stems not so much from the size or economic power of the firm in a core market, but from its structural make-up, defined by the constitution of ecosystems composed of a plurality of services that revolve around the core business.[4] A common feature of dominant digital platforms is that they are integrated into a plurality of business lines, including the markets they organise or connect, so that they operate a platform and market their own goods and services on it. The origin of this integrated structure may be either due to internal business growth or be the result of mergers in the various markets involved. In either case, this structure places the dominant platform in direct competition with some of the firms that depend on it.

Thus, for example, Apple (*Apple App Store*), Google (*Google's Chrome Web Store*; *Cloud Marketplace*, *Play Store*), Windows (*Games Store, Xbox games*), Nintendo (*Games Store*), Sony, Shopify, etc. not only organise a marketplace for apps or games but also offer their own apps or games alongside those of independent third-party professionals. In e-commerce, companies such as *Amazon, JD.com* or *Walmart* act both as marketplace organisers (enabling third-party sellers to transact with consumers) and as sellers, supplying products under their own name.

This dual role played by platforms in various digital markets, acting simultaneously as intermediaries and providers, contains a conflict of interest that has raised fears that it may be exploited by platforms to further entrench their dominance, frustrate competition and stifle innovation.[5] The vertical integration of digital platforms has thus unleashed the suspicions of competition authorities and the fear that platforms may engage in conducts that tends to favour their own products over those of their professional users, known as "self-preferencing" or "self-preferential" conduct. These behaviours would be due to the dual condition of the platform, which will usually be able to control and access all the information produced in its ecosystem, obtaining a superior knowledge of the markets in which its own professional users operate than that of its own professional users.

In Europe, some of the cases brought in digital markets are based precisely on the anti-competitive nature of *self-preferencing* conduct. For example, the first case against Google, known as *Google Shopping*,[6] accused it of abusing its dominant position in the browser market by favouring its own price comparison services. Similar concerns are present in the allegations

[4] See AITOR ZURIMENDI, *Gigantes tecnológicos, Distribución Online y Derecho de la Competencia*, Thomson-Reuters/Aranzadi, 2021, pp. 40 et seq.
[5] See LINDA KHAN, "The Separation of Platforms and Commerce", 119, *Columbia Law Review*, 2019, pp. 973 et seq.
[6] Commission Decision of 27 June 2017, Case AT-39740, *Google Search (Shopping),* confirmed by the GC in Judgment of 10 November 2021, Case T-612/17.

against Apple for the use of its App store where it offers its own apps alongside those of third-party developers.[7]

Self-preferencing is also at the heart of the Commission's abuse of dominance charge against Amazon for the company's use of sensitive information from independent sellers to compete against them, as well as for the use of the *buy-box* and the Amazon Prime programme. Although the Commission has accepted, in December 2022, Amazon's commitments in relation to both investigations[8] and although this fear that vertical integration may lead to self-preferential behaviour is present in all the cases mentioned, the ease with which it is identified in Amazon makes it advisable to use this case as a parameter or starting point to examine whether these conducts (and structures) can really be harmful to competition. It is also especially illustrative to assess, where appropriate, the possibilities of legal action to eliminate or mitigate the possible dangers, especially bearing in mind the evanescence and, in our opinion, limited operability of the commitments made by the company.

In order to understand the scope of the allegations, it is useful to briefly recall Amazon's business model. Amazon offers an online marketplace, *Amazon Market Place*, intermediating between professional sellers and consumers. The company operates a multi-sided platform, which is characterised by allowing direct interaction between sellers and customers, each of whom is linked or connected to the platform. Customers have to open an Amazon account in order to access the platform and sellers have to join Amazon by paying a fee, which will vary depending on the selling plans, the category of products sold and the way orders are placed.

This type of platform is very attractive to business marketers because it allows them to greatly expand their potential customers, reaching an audience that would otherwise have been impossible. The platform, in turn, relies on these sellers to increase its value to consumers. Although it depends on these sellers for its success, in practice, as a result of network effects and control of market access, Amazon acts as a true regulator, setting - and imposing - the rules of interaction. The possibility of abusive exploitation of these situations of economic dependence can thus be raised. Concerns are heightened when the platform acts not only as an intermediary, but also competes directly with its professional sellers by offering its own products on the online marketplace. This is the case of Amazon which has developed more than twenty own brands as a distributor, *Amazon Basics*, *Spotted Zebra* (children's clothing) or *Solimo* (household goods).[9]

Amazon's business policies and commercial strategies have not gone unnoticed by competition authorities. Amazon has been the subject of several proceedings in Europe on suspicion of

[7] See https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1217.

[8] In the United Kingdom, the Competition and Markets Authority (CMA) launched an investigation in July 2022 into concerns that Amazon was abusing its position as the UK's leading online retail platform by giving an unfair advantage to its own retail business over competing sellers that use Amazon Market Place, or to sellers that use Amazon's own warehousing and delivery services, rather than rival logistics businesses. In response to these concerns, Amazon has also offered commitments not to use Market Place seller data and to treat all sellers' offers equally when selecting which to feature in the Buy Box.

[9] See VLADYA REVERDIN, "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*, vol. 12, no. 3, 2021, pp. 181 et seq.

infringement of article 102 TFEU. In 2019, the aforementioned investigation was launched into possible anti-competitive practices arising from the dual role played by this company in the *Amazon Marketplace*, acting simultaneously as a platform for interaction between retailers and consumers and as a seller through its own platform.

Amazon was accused of using sensitive data from/about independent sellers (products offered, transactions made...) obtained through its intermediary role in the Marketplace to inform its decisions as a retailer. By having access to the most recent and relevant data, it can successfully replicate products, lower their prices and adjust their visibility on the web.

Following this proceeding, the Commission opened a second investigation to explore Amazon's practices in relation to its *Buy Box*. Amazon does not limit the number of sellers that can offer the same product, but it does select a single offer to be placed in the *Buy Box*, the little white box on the right-hand side of the screen through which a consumer can add the chosen product to the shopping cart. As 80% of purchases are made on Amazon through the *Buy Box,* winning the Buy Box is crucial to the success of sellers operating on this platform. The question was whether Amazon - through the opaque operation of the *Buy Box* - artificially favours its own offers or the offers of those sellers who use its logistics system (the so-called *Amazon FBA*).

The use of the *Buy Box* and the logistics policy led to the sanctioning of the company in Italy[10] and investigations are also underway for these alleged self-preferential conducts in Germany, the US and the UK. In the UK, in addition to the investigation conducted by the CMA[11] (*Competition Market Authority*), a multi-million dollar class action (similar to the one against Facebook) has been announced. The company is accused of referring users of its website and app to offers that benefit Amazon while hiding offers that may be better for consumers through a self-favouring algorithm.[12]

3. Legal possibilities for action against self-preferencing

3.1. Control of structures versus control of behaviour?

The formation of ecosystems with the vertical integration of large technological platforms generates concern and fear about the possible recourse by these operators to self-preferencing practices that could harm the interests of consumers or the development of the competitive process in the markets. What are the legal possibilities for action in the face of such conduct? Before attempting to answer this question, it is appropriate to advance two considerations,

[10] In December 2021, the *Autoritá Garante della Concorrenza e del Mercato* (AGCM) fined Amazon €1.1 billion for abuse of a dominant position in the Italian market, by favouring its logistics service among sellers active on the Amazon.it platform, to the detriment of competing operators in that market. The fine has been suspended by the Lazio Regional Administrative Court until the European Court of Justice rules on the appeal brought by Amazon against the lawfulness of the fine.

[11] See <https://www.gov.uk/cma-cases/investigation-into-amazons-marketplace> (30.08.2023).

[12] <https://www.hausfeld.com/en-gb/news/e-commerce-giant-amazon-faces-legal-action-for-unlawfully-favouring-its-own-product-offers/> (30.08.2023).

both in relation to the difficulty of delimiting suspicious conduct and to the advisability of subjecting it to legal control.

Firstly, this term "self-preferencing" has recently been coined and used by doctrine, regulators and competition authorities in relation to certain practices (subject to prosecution in antitrust proceedings) in which platforms favour their own products or services over those of their professional users. However, this term may include discriminatory conduct of greater or lesser intensity, from attenuated forms of giving prevalence to one's own products or services to outright refusals to contract the products of competitors.

Secondly, it should be borne in mind that the fear of self-preferential behaviour is not unanimous and that at the root of this issue lies the ever-present debate on the need or otherwise for public authorities to intervene and the possible brake on innovation that limiting the actions of these large companies could generate.[13]

In principle, two types of measures are possible in the face of such behaviour. A more radical solution, which takes into account the structural nature of the problem and therefore starts from solutions or remedies of this nature. In its most extreme vision, directly prohibiting the vertical integration of technology platforms. Thus, legislation passed in India in 2019 forced the separation of the two types of business (intermediation and sale), forcing companies such as Amazon or Walmart to change their model and stop selling under their own brand. In the US, the so-called *Anti-Tech Bills* are currently going through parliament. One of them, the "*Ending platform monopolies Act*" directly prohibits situations of vertical integration, eliminating any possible conflict of interest.

This structural prohibition is in the minority, and most states are looking for other types of solutions to contain the risks of vertical integration, more focused on controlling the platform's conduct that could constitute manifestations of self-preference.[14] We have already seen that competition authorities, as a first solution, have sharpened their antitrust weapons and have accused these companies of infringing the prohibitions against abuse of dominant position or market monopolisation.

Apart from the open antitrust cases, on 12 October the final version of the Digital Markets Act or DMA was published in the OJEU, which gives companies that qualify as gatekeepers a period of six months to comply with its requirements and behavioural standards. This rule specifically covers *self-preferencing conduct*, so that, if the subjective requirements are met, it could be applicable in this case, regardless of the outcome of the antitrust proceedings. This regulatory model has also been followed in certain countries such as Germany, which has applied it to Amazon and Facebook, and is being considered in other regulatory proposals in the United

[13] See for example, insisting on the risks for innovation and economic efficiency that could derive from excessive control of the conduct of large technology platforms, ERIK HOVENKAMP, "Proposed Antitrust Reforms in Big Tech: What Do They Imply for Competition and Innovation?", *CPI Antitrust Chronicle*, July 2022, p.15.

[14] From an economic perspective, some authors have analysed the possible implications of different legislative policy options for dealing with self-preferencing and systematic imitation of competitors' products, arguing for the greater efficiency associated with the control of these behaviours as opposed to the direct prohibition of vertical integration. See ANDREI HAGIU/TAT-HOW THE/JULIAN WRIGHT, "Should platforms be allowed to sell on their own marketplaces?", *The RAND Journal of Economics*, vol. 53, 2, 2022, pp. 297 ff.

Kingdom and in other US *Anti-tech Bills* such as: the *American Innovation and Choice online* Act, which grants authority to the FTC and the DOJ to impose civil penalties and injunctions against covered platforms if they engage in certain typified self-preferencing conducts, or the *Open App. Markets Act*, which seeks to prevent *self-preferencing* practices in the market for software applications.[15]

The direct participation of a company in a market which it organises and manages constitutes a clear conflict of interest situation and can, in our view, also be analysed from other legal perspectives which focus on the honesty or fairness of transactions rather than on the impact of business conduct on the market structure or results, such as, for example, unfair competition law.

We will analyse separately the applicability of each of these areas of law to the specific conduct of using data to inform sales decisions in competition with professional sellers.

3.2. Difficulty of application of antitrust law

The cases against Amazon, both the one closed with commitments by the Commission and others opened by national competition authorities, fall under the umbrella of Article 102 TFEU, i.e. they concern conduct assessed as constituting a possible abuse of a dominant position. In principle, the fact that a company is vertically integrated is not prohibited by competition rules, nor does the expansion of a company into a downstream market constitute an anti-competitive act.

The problem would be the way in which the expansion is being carried out. The European Commission's concern was centred on the inappropriate use of data obtained from the platform's professional users - in principle to improve the service provided - but in reality to improve Amazon's own offerings (its own brand or those of third parties whose distribution it handles). Access to this information (market trends, consumer ratings, product characteristics, sales levels, existence of demand, investments made, etc.) allows the platform to decide whether or not to start producing a certain good, under better conditions than its rivals and with a better positioning on the platform. This information is not available to the rest of the sellers operating in the market, which puts them at a competitive disadvantage.

The main problem posed by the application of Article 102 TFEU - or its national analogues - is that the conduct in question does not fit neatly into the usual parameters for assessing the unlawfulness of a business practice under antitrust law or into the case law that the application of this rule has generated, i.e. there is a problem of delimitation of the legal test or of the specific theory of antitrust harm applicable to this conduct.

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[15] ERIK HOVENKAMP, "Proposed Antitrust Reforms in Big Tech: What Do They Imply for Competition and Innovation?", *cit.* pp. 10 et seq.

The possible effects would be produced in a market other than the one in which the company occupies a dominant position that is being used precisely to achieve this expansion, which constitutes a manifestation of the *leverage theory* that arose in the USA and which, in Europe, would find its parallel or equivalent in the doctrine of abuse in related markets.

In its narrowest version, this theory considers that certain business practices are explained or used as an instrument for extending monopoly power from one market to another. The necessary effect of the practices is therefore the creation of a position of economic power in a market where it did not previously exist.

However, this is not the only meaning of the idea of *leverage*. Various authors give a much broader content to the concept, defining it as the use of power in the market for a certain good in order to obtain a competitive advantage in the market for a different good.[16] This notion covers all those cases in which business conduct affects the development of competition in a second market. This may be of greater or lesser intensity, ranging from a mere distortion of competition on the basis of business merits - regardless of whether the structure or functioning of the second market is modified - to the alteration of the competitive structure of the second market, through the exclusion of current competitors or the erection of entry barriers that prevent or hinder the development of current or potential competition, or even, in its most intense manifestation, the immediate creation of positions of market power that result in supracompetitive pricing.

Rather than constituting a specific category of prohibited conduct, the theory of *leveraging* has been used as an analytical tool in the assessment of the competitiveness of certain practices, such as exclusivity agreements, vertical integration, discriminatory pricing policies, refusal to contract and most notably tying practices.

Does this possible leveraging of the *market place* intermediation market into the market place or rather online distribution markets fit into any specific practice?

One option is to try to treat Amazon's power to give preferential access to data only to its affiliated services as a kind of *refusal to deal*. According to CJEU case law, for a refusal to deal to be considered abusive, four cumulative requirements must be met: 1) refusal to provide access to an input; 2) indispensability of that input (if alternatives exist, even if they are less advantageous, the indispensability requirement is not met); 3) elimination of competition in a downstream market; and 4) absence of an objective justification.[17] In the Amazon case, the question is whether the data, to which competitors in the distribution market do not have access, can be considered indispensable to compete in that market, and whether there is no objective justification for Amazon not sharing its databases with sellers. The applicability of this category is, in our view, extremely strained. Neither the data is indispensable to compete in the retail market (in the sense of irreplicability or lack of reasonable alternatives) nor the fact that Amazon keeps this information to itself eliminates all competition in the retail market.

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[16] PHILIP AREEDA/DONALD TURNER, *Antitrust Law*, Boston-Toronto, 1978, p. 202; ANTONIO CUCINOTTA: "Il regime monopolistico delle tying clauses*", Riv.dir.priv.,* núm.1, 1993, p. 79.

[17] See RICHARD WHISH, *Competition Law*, Oxford, Oxford University Press, 2009, pp. 698 et seq.

Moreover, not only is a refusal to provide such information justified, but it may also result from a regulatory imperative. The prohibition to grant access to such information may result not only directly from data protection law, but also from the competition rules themselves, which sanction the exchange of information between competitors.

Some authors propose the possibility of examining the conduct imputed to Amazon on the basis of a particular form of refusal to contract, namely *margin squeeze*.[18] This theory refers, in principle, to cases where the dominant firm charges a price for the product in the upstream market that, compared to the price it charges in the downstream market, does not allow even an equally efficient competitor to trade profitably in this market on a lasting basis. Although originally articulated around price, based on European case law[19] a broader interpretation of margin squeeze is defended, which would cover all those cases in which the dominant firm trades with its downstream competitors under disadvantageous conditions, i.e. the focus would not be on prices but in general on the conditions of access to the input.

It would then be necessary to demonstrate that the conditions under which retailers have access to the platform's data place them at a disadvantage and produce anti-competitive effects.

In any event, similar problems arise when applying this test to Amazon's conduct as those raised by the refusal to deal. While it is possible to prove that access to the data as a result of its intermediation work gives Amazon a competitive advantage in the retail market that its rivals do not enjoy, it is also necessary to prove the size of this advantage and its potential ability to foreclose rivals that are at least as efficient as Amazon.

Alternatively, the conduct could not be confined to any of the specific categories or abuses and *self-pricing or leveraging* could be assessed as *a specific form of abuse in itself.* This seems to have been the solution adopted in the *Google shopping* case, where the European Commission has sanctioned the platform because not all price comparison services were treated equally in the browser. In other words, discrimination is at the heart of the judgment, but without regard to actual or potential exclusionary effects, it is prohibited *per se*.

The decision in the *Google Shopping case*, endorsed by the General Court, and other manifestations of the repression of self-preferential practices via Article 102 TFEU, such as the Google Android case, or the investigations underway against Apple or those raised in the Amazon case, are controversial and have sparked numerous criticisms, which accuse this trend of implying a break with antitrust policy and of being difficult to fit into the current framework for assessing anti-competitive harm. It would involve a regulatory use of antitrust law, which, disconnected from the real effects of the practices, would treat digital companies as *common carriers* present in regulated markets such as telecommunications or transport markets, imposing on them by means of a broad configuration of antitrust law a general obligation of

[18] See VLADYA REVERDIN, "Abuse of Dominance in Digital Markets, *cit.* pp.191 et seq.
[19] Judgment of the CJEU of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09.

non-discrimination, which would mean that companies could not use these inputs or would have to guarantee access to them to third parties in order to compete on equal terms.[20]

Obviously, in order to assess whether conduct is anti-competitive, it is necessary to determine what is meant by harm to competition, a changing notion that has experienced different scopes over time. The current predominant conception in Europe and the USA, regardless of the greater or lesser flexibility in one system or the other, is that the conduct must have an impact on the market (either immediately in terms of its results with proof of the existence of an increase in prices or a restriction of production, or mediately through a significant impact on the structure of the affected markets). In markets that must also be adequately delimited in order to be able to assess the effects of the practices in concrete terms and not on the basis of an alleged harm in the abstract without specific projection.

Therefore, competition law or *antitrust* law is not, in our view, the most appropriate instrument for assessing this type of conduct. In fact, this inadequacy and insufficiency to resolve competition problems in digital markets is probably behind the closure of the Amazon case with commitments. Regardless of the opening of new cases and the fate of open cases, it is the very inadequacy of *antitrust* law that has led to the search for other solutions, which judge these practices from different parameters, more focused on fairness, equity or justice in commercial transactions and on the need to protect the conditions under which the competitive struggle in the market takes place. In our opinion, this is the purpose of the new regulatory solutions, such as the DMA or similar national proposals.

3.3. Regulatory solutions: DMA assessment

The DMA or Digital Markets Act is a model of *ex ante* regulation or preventive control of the conduct of dominant operators that meet the quantitative requirements to be considered "gatekeepers". The idea behind this regulation is to control the position of certain digital market operators, the large technological platforms, by means of *ad hoc* solutions to deal with situations perceived as a risk or danger to the development of the markets or the interests of consumers and which it is feared cannot be adequately addressed by the "classic" antitrust rules (for example, *self-preferencing* practices; situations of economic dependence; risk of *tipping, etc.*).

As far as the applicability of the rule to Amazon is concerned, although it seems clear that the adoption of the DMA was clearly aimed at establishing rules of conduct for the large platforms included in the GAFA acronym, the company has to be designated as a *gate keeper* by the Commission beforehand.[21] In a similar framework, it has already been specifically considered

[20] PABLO IBAÑEZ COLOMO, insists on this idea of "common carrier antitrust" in various works, see, *inter alia,* https://chillingcompetition.com/?s=amazon.

[21] By the deadline (3rd July), the Commission has received notifications from seven companies: *Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft* and *Samsung,* who declared they met the thresholds to qualify as a gatekeeper under the DMA.

by the German competition authority under section 19(a) of its Competition Act as an "undertaking which is of significant importance for competition in the markets".[22]

It is important to understand that the DMA is not a system of discretionary oversight of misbehaviour by companies in positions of control, like the abuse control system. A specific list of prescriptive and proscriptive rules applies as soon as a company is designated as an access gatekeeper. There is no requirement of misuse of control power that triggers the application of conduct obligations. This avoids the main difficulty in enforcing antitrust rules: the DMA does not make its obligation conditional on proof of harm to competition.

As regards self-preferencing practices, recital 46 of the regulation warns about the risks where the gatekeeper has a dual role as a provider of basic platform services and as a competitor to professional users in the provision of services. In relation to data, it advocates the need to "ensure that gatekeepers do not use non-public data to provide services similar to those of professional users". Already in the body of the regulation, Article 6.2. includes the obligation of the gatekeeper "not to use, in competition with professional users, any non-publicly accessible data generated or provided by such professional users".[23] Thus, exactly the same conduct for which Amazon was being prosecuted under Article 102 TFEU.

In reality, the DMA is an *ad hoc* regulation, which codifies the approach followed in various *antitrust* cases in an attempt to generalise its findings and accelerate the implementation of remedies by establishing *per se* enforceable behavioural obligations on gatekeepers (as long as they retain that status). In fact, the commitments offered (and accepted by the Commission) by Amazon virtually replicate the conduct obligations required by the Regulation.[24]

The DMA, in order to avoid discriminatory treatment, does not give the option of guaranteeing access to information, but prohibits its use by the platform. Thus, for example, in *Google shopping*, this possibility was open, the decision was limited to prohibiting Google from discriminating between price comparators. The DMA does not prohibit vertical integration, but the company will have to ensure that there are information barriers (so-called Chinese walls) and that neither its employees can exchange information nor its automated algorithms/tools.

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[22] Decision available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B2-55-21.html;jsessionid=AC10ED758803AB18CD0A995FAD76FDB9.1_cid362?nn=3591568> (30.08.2023).

[23] This data includes 'all aggregated and disaggregated data generated by professional users that may be inferred or collected through the business activities of professional users or their end-users, including clickstream, search, view and voice data, on relevant core platform services or on services provided in conjunction with or in support of relevant gatekeeper core platform services'.

[24] Amazon commits to: (a) not use private data relating to, or derived from, the activities of independent sellers on its platform for Amazon's activity as a retailer; (b) ensure equal treatment of all sellers when ranking offers for the selection of the designated Buy Box company, (c) highlight a competing second offer to the Buy Box designated company's offer if the second offer is sufficiently differentiated from the first offer in terms of price or delivery. In both cases, the platform must provide the same descriptive information and the same shopping experience, (d) establish non-discriminatory conditions and criteria for the qualification of its Prime sellers and Prime offers, (e) ensure that Prime sellers can freely choose their carrier and negotiate with them the terms of service. In this regard, Amazon must provide the means for independent carriers to contact customers on its platform, f) not use for its own logistics services information obtained through Prime about the conditions and performance of third-party carriers.

It is now a *common carrier*… but by way of non-competition law regulation (and, in fact, as an exception to it).

3.4. Unfair conduct?

If the DMA does not apply because a company does not qualify or no longer qualifies as a *gate keeper*, there is still another possible legal avenue for dealing with self-preferential practices. Let us recall that the market functions as a parameter for determining the applicability of *antitrust* law and marks the competences and relations with another sector of the legal system closely related to it: the law of unfair competition.

Recourse to unfair competition makes it possible to introduce an element of fairness, *fair play*, meritocracy, etc., in the assessment of business practices which, although at some point in history, was present in the configuration of the antitrust offence, it was gradually banished in favour of more economistic orientations.[25]

Although self-preference is not expressly contemplated in the Spanish Law on Unfair Competition (LCD), there are some specific unfair conducts that may have the same scent, such as taking unfair advantage of the efforts of others (Article 12) or acts of imitation (Article 11).

The general clause penalises as unfair any conduct which is contrary to the requirements of good faith. The inclusion of good faith as a criterion for assessing the unfairness of conduct has established a standard of conduct that sets a limit to the subjective right to freely carry out an activity in the market. What standard of conduct? It is unfair what an honest entrepreneur would not do. But not only that, in some business conduct, an element must also be introduced that takes into account the management of other people's business and representativeness. Would an honest representative enter into competition with his principal? Would an honest representative enter into competition with his principal by using the information that his position as a representative confers on him?

In the Spanish legal system we can find numerous cases in which the possible conflict of interest that may arise between a manager of other people's interests and the person on whose behalf he or she is acting is typified, and the establishment of rules of conduct required of all those who act on behalf of others: commission contracts, agency contracts, the factor regime provided for in the Spanish Code of Commerce; or the duty of company directors to behave with the diligence of an orderly businessman and a loyal representative. Some important doctrinal sectors have argued that the technological platforms act as a kind of agent for their

[25] See. SANDRA MARCO COLINO, "The Antitrust F Word: Fairness Considerations in Competition Law", *Journal of Business Law,* 2019, pp. 329-345.

suppliers or professional sellers.[26] What is undoubtedly true is that, for example, in the case of Amazon, the platform acts as a manager of other people's interests, undertaking to provide a market intermediation and organisation service and to facilitate the placement of its client's products on the market. For the optimal management of that service - and consequently of its performance - it collects certain information. The use of this information, not to improve the service, but to compete against the seller who provides it, could, in our opinion, be liable to violate the legitimate trust of the latter, as well as the duty of loyalty and to avoid the conflict of interest that it is incumbent upon it as a manager.

In conclusion, it is more feasible to reproach this type of self-preferential conduct for unfairness than for anti-competitiveness in view of its exclusionary potential.

This reproach may result from the application of the rules of unfair competition or may already be expressly typified in the DMA, if the company that carries out this type of practice can be qualified as a *gatekeeper.* These operators would indeed occupy a parallel position to the incumbents in the telecommunications market. And this is the appropriate framework for doing so, not antitrust law, which would otherwise run the risk of effectively becoming a purely regulatory system.

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[26] PINAR AKMAN, "Online platforms, agency and Competition Law: Mind the Gap", 43, *Fordham International Law Journal,* 2019, pp. 209 et seq.

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