



# Amazon under fire for abuse of dominance in antitrust proceedings - Comparative study of different procedures

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**Resume:** *On May 25, 2021, the Washington Attorney General Karl Racine opened an antitrust proceeding against the American giant Amazon. This latest case is one of the many that the company is facing, both in its home country and across the Atlantic in Europe.*

## I. Factual background.

### 1. GAF A in our lives.

We know the Big-Tech giants - - the famous GAF A - have imposed themselves as the first global economic powers in no time, as explained by the General Secretariat of the UNCED in a 2019 conference report "*The big technology companies have imposed themselves in many areas of everyday life, from shopping to social interactions*"<sup>1</sup>.

these GAF A have become an imperial power within ten years<sup>2</sup>. We are talking about a total amount of more than 3,650 billion dollars of

capitalization between them<sup>3</sup>. Such a power was made possible because these platforms have created a real dependency<sup>4</sup> that is established both at the level of consumers, as well as with many companies that are generally dependent on these platforms and especially Amazon which is the most blatant example of this reality through its marketplace.

### 2. Who is Amazon?

It was in 1994 that Jeff Bezos had the idea of selling any book to any reader in his garage<sup>5</sup>. As for its development, the CEO had a clearly

<sup>1</sup> UN, "United Nations Conference on Trade and Development," May 1<sup>st</sup> 2019, P.1.

<sup>2</sup> R. Winkler, "How Gafam have become imperial powers in 10 years," *L'Opinion*, December 25, 2019.

<sup>3</sup> N. Richaud, "Google, Apple, Facebook, Amazon: 2019, the dark year of the tech giants," *Les Echos*, December 26, 2019.

<sup>4</sup> C. Sallès, "Why technology is making us so happy ... and so addicted," *The Digital Edition*, October 28, 2017.

<sup>5</sup> G. Dabi-Schwebel, "How Amazon Became Amazon," *1min 30 Media*, March 1<sup>st</sup> 2019.

stated objective, which he even wrote on the t-shirts of his employees "Get Big Fast"<sup>6</sup>. He quickly stated that Amazon was not just a retailer of consumer products, but a technology company that aimed to simplify online transactions for consumers and producers<sup>7</sup>. The company took a long time to generate profits, but this was due to the rapid growth strategy reflecting the will of its CEO, and it was only in 2001 that they were able to generate profits for the first time.

However, over the years, this company has greatly changed the market and even the way people consume<sup>8</sup>. With their ultra-fast deliveries, and a product offer superior to that of the largest retailers, the company has become one of the leaders in mass distribution, without experiencing the difficulties that traditional retailers can have. The fact that a company makes use of a form of market called the "Marketplace" is surely one of its most significant advantages for many reasons, but also the cause of many problems for antitrust law.

### 3. The Marketplace.

This term simply refers to a platform that puts buyers and sellers in contact on the Internet. The platform recovers a

commission through this intermediation service in exchange for its hosting, for the sales that it has allowed to realize. There are two types of platforms, : (i) those that are purely Marketplace, that is to say that they only offer the products of third party sellers like EBay ; (ii) Then the one like Amazon which hosts the products of third party sellers, but also offers their own product lines.

This is important to note, at least in Europe, taking into account the example of Amazon. When a third-party company wants to access the Marketplace of the company, the latter must necessarily consider that Amazon, being neither the buyer nor the seller of the products, declines any responsibility. The responsibility lies exclusively on the companies selling their products on the platform. It is the specificities that the European Union Countries wanted to put in place to simplify the digital development of Europe with a directive 2000, "*directive on electronic commerce*"<sup>9</sup>.

These marketplaces have had a beneficial effect on many companies, although many of them realize the limitations of this form of marketplace, at least when the company that owns the platform also offers

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<sup>6</sup> B. Saporito, "How Jeff Bezos Created a \$280 Billion Empire," *Maxim media*, May 31, 2016.

<sup>7</sup> A. Orsini, "Who is Jeff, Amazon boss and short-lived richest man in the world? ", *Numerama*, August, 02 2017.

<sup>8</sup> C. Chédeville, "Comment Amazon a bouleversé la consommation des Français," *20 minutes économie*, le 16, July 2015.

<sup>9</sup> EU Directive 2000/31/EC, June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce").

to sell products on that same marketplace. This dual presence in the value chain tends to worry competitors, and often with good reason.

## II. Amazon and competition law.

Like all the GAFAs, Amazon could not cut it, competition law is catching up with the company on its potential anti-competitive practices. Reproaches can be divergent depending on the country and the authorities, and the procedures also tend to have different characters and specificities. However, one point unites them all: they all want to see Amazon punished for abusing its dominant position on the market.

### 1. Differences in approach between European national competition authorities and the European Commission.

a) The Bundeskartellamt in the front line against Amazon.

The German competition watchdog was one of the first European players to monitor the actions of the company founded by Jeff Bezos. Its past and current actions show that

although it is aware of the importance of the European Commission's mission to regulate GAFA, the German National Competition Authority does not intend to simply rely on the action of the European Authority.

It is first in 2018 that the Company will be in the target of an investigation for abuse of dominant position from the German<sup>10</sup> authority. In this case the German competition authority looked at the clauses that the company Amazon could impose on merchants relating to the listing of their products and the conditions of cancellation or payment terms<sup>11</sup>. This situation and case will find a "happy" ending, in the sense that it will not be a condemnation, but an agreement between the German authority and the American firm<sup>12</sup>. The expeditious procedure of 7 months will allow a considerable improvement of the situation of the sellers on the Amazon marketplace, and as surprising as it may seem, this decision allows an agreement not on a national scale, but on a European scale<sup>13</sup>.

For all that this decision ended with an agreement, it does not reassure the German authority. The latter does not intend to relax its guard and has even strengthened its surveillance of GAFA. This is illustrated by the fact that a little more than a year after

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<sup>10</sup>Bundeskartellamt, Press release, "Bundeskartellamt initiates abuse proceeding against Amazon," November 29, 2018.

<sup>11</sup> A. Robin, "Places de marché en ligne", LexisNexis, JurisClasseur Commercial, Fasc 827, October 31, 2019, pt. 31.

<sup>12</sup> Bundeskartellamt, July 17 2019, Case. B2-88/18

<sup>13</sup> Bundeskartellamt, Press release, "Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces," July 17, 2019.

the boss of the German antitrust Andreas Mundt declared in the national press: "*We are currently investigating whether and how Amazon influences the way merchants set prices on the market*"<sup>14</sup>. A procedure that is still ongoing but that will not be the only one. Germany has in January 2021 adopted a new law that according to many observers "*disrupts competition in the digital*"<sup>15</sup>. This new law gives immense power to German authorities also increases the speed of procedures. The real innovation is the change in the substance of the notion of abuse of dominant position, which is no longer an essential condition for the intervention of the authority. Its intervention will henceforth be possible as soon as the company in question presents a primordial character on the market, in particular because of their means<sup>16</sup>. We are therefore excessively far from the core of the definition of a dominant position, as it has been established in European pre-trial law<sup>17</sup>.

With this new law, the Bundeskartellamt does not intend to wait before using it. Amazon will be the first company to pay the price. On May 18, 2021, the German authority publicly announces a

"Procedure against Amazon based on the new rules for large digital companies"<sup>18</sup>. In this particular case of this new law, we are entitled to ask ourselves what the different steps are, but also the reproaches that are imputed to the company. The answer is provided by President Mundt of the Bundeskartellamt explaining the press release announcing the opening of the procedure, the physiognomy of the latter: "*In this particular case, we first examine whether Amazon is of key importance for competition between markets. An ecosystem that spans several markets and thus constitutes an almost unchallengeable position of economic power is particularly characteristic in this respect.*"<sup>19</sup> The company itself answers the first question, explaining that it works closely with the German authority, but also specifying the "benefits" of its presence in the country: "*Amazon employs 23,000 people in Germany, has invested 28 billion euros in the country since 2010 and works closely with local research*"<sup>20</sup>. In this case, what will be observed in this procedure is the entire behavior of the American giant, including self-preferencing practices, a major issue that also worries the European Commission.

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<sup>14</sup> V.H. Bündler, J. Jansen. "Amazon darf kein Preiskontrollleur sein," *Franffurter Allgemeine*, August 16 2020.

<sup>15</sup> C. Macquet, "Ahead of Europe, Germany disrupts digital competition," *Siècle Digital*, January 18, 2021.

<sup>16</sup> N. Steiwer, "L'Allemagne muscle son Antitrust face aux géants du net", *Les Echos*, January 15, 2020.

<sup>17</sup> ECJ, February 14, 1978, Case 27/76, *United Brands Cie*: ECR 1978; ECJ, February 13, 1979, Case 85/76, *Hoffmann-La Roche*: ECR 1979.

<sup>18</sup> Bundeskartellamt, Press release, "Proceedings against Amazon based on new rules for large digital companies (Section 19a GWB)", May 18 2021.

<sup>19</sup> *Ibid*

<sup>20</sup> N. Lomas, "Amazon's market power to be tested in Germany in push for 'early action' over antitrust risks," *TechCrunch*, May 18, 2021.

b) The Commission and a surprisingly late procedure.

The Iron Lady of GAFA Margrethe Vestager<sup>21</sup> arrived with the promise of a strict and uncompromising line to regulate Big Tech. Her work began immediately with Google and the Commission has not let go of the bridle, imposing more than 8 billion in fines in three cases, to the company. But surprisingly the case of Amazon comes in late, as it is only in 2019 that the Commission announced the opening of an investigation into a potential anti-competitive practice by Amazon<sup>22</sup>.

In this press release, the European Commission first recalls that Amazon has a dual role on its platform: first, the company provides a "Marketplace" for independent sellers, and second, it sells products as a retailer on this Marketplace. In parallel, a preliminary investigation by the Commission shows that Amazon uses competitively sensitive information about Marketplace sellers, their products and transactions on the Marketplace.

In *fact*, in its in-depth investigation, the Commission is examining two issues: the

standard agreements between Amazon and Marketplace sellers, which would allow the Amazon subsidiary to use the sensitive data that Amazon uses according to the preliminary investigation. The second issue is the role of the data in the selection of Buy Box winners and the impact Amazon would use the information to win the Buy Box.

This investigation will soon be completed, a little more than a year later, the Commission made a new statement indicating that the grievances were communicated to Amazon regarding "the use of non-public data of independent sellers", and wished to open another investigation into the practices of the company in terms of e-commerce<sup>23</sup>. This second investigation is an extension of this questioning on the "Buy Box". This extension is notably due to this new typology of practice that has been identified by the law of precedent, the self-preferencing. This extension is due to the preferential treatment of Amazon's retail offers and those of its marketplace sellers who use the American firm's logistics services.

On the first issue that is the subject of the statement of objections, it is a sensitive subject in Europe. The informational opacity between the platform and the independent

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<sup>21</sup> V. Jolly, "Margrethe Vestager, une dame de fer face aux géants du web," *Le Figaro*, October 13, 2017.

<sup>22</sup> EU Comm, Press release, "Anti-competitive practices: Commission opens investigation into possible anti-competitive behavior by Amazon" IP/19/4291, Brussels, July 16, 2019.

<sup>23</sup> Comm.EU, Press release, "Anticompetitive practices: Commission sends statement of objections to Amazon regarding use of non-public data of independent sellers; opens second investigation into its e-commerce practices," IP/20/2077, Brussels, November 10, 2020.

sellers is a major problem, which the European legislator is trying to solve with the P2B regulation established in 2019<sup>24</sup>, which aims to promote fairness and transparency for companies using online intermediation services.

Amazon is therefore facing two potential abuses, in this case it is a double typology of abuse. The first is the use of sensitive data, which takes the form of an exploitation abuse. The second problem, the potential preferential treatment, takes the form of an abuse of eviction.

The Commission is therefore faced with two major problems, one of which seems to be observed by the German national authority as well. It is understandable that self-preferencing, despite the doctrinal debates that this type of practice may give rise to as to its anti-competitive origins or not, tends to be the pillar of a real concern for the European competition authorities. There is a kind of European consensus on how to deal with Amazon's practices, whereas on the other side of the Atlantic, the situation is a bit more divided.

## 2. The United States a two-sided antitrust battle.

- a. A delicate approach of the GAFA by the American antitrust.

The United States are the founding fathers of antitrust with the Sherman Act in 1890, which was one of the first legal texts to prohibit abuses of dominant positions and cartels. It was certainly the most active antitrust law, and the most evolving under the influence of the Chicago school, which advocated an increasingly economic approach.

For all that and as surprising as it may seem, this great antitrust nation has had some fear and hesitation in front of the GAFA. These large technology companies are undeniably innovative powers<sup>25</sup>. This characteristic has made the US antitrust authorities hesitate to act. Still driven by the Chicago School, which advocates a strong economic liberalism, the idea prevails that the application of antitrust law is not only futile, but also threatening to innovation<sup>26</sup>. There is a major fear, which is that of so-called type 1 "false positive" errors, this type of error is the fact of condemning a practice that would have positive effects and therefore be pro-competitive, which would lead to a wrongful conviction. There was therefore an abstentionism on the part of the competition authorities, even despite the numerous recommendations.

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<sup>24</sup> Cons. EU, Reg. (EU) 2019/1150, June 20, 2019: OJEU L 186, Jul. 11, 2019.

<sup>25</sup> M. Pelloi, "20 ans qui ont changé le monde : Les Gafa, champions de l'innovation", *Le Parisien*, January 2, 2021.

<sup>26</sup> C. Prieto, "Numérique et abus de position dominante," *LexisNexis, Cahier de droit de l'entreprise* No. 3, May 2019, File 18.

We had to wait for an article by Lina Khan on Amazon<sup>27</sup> to finally have an awareness. In this article, the young lawyer draws a picture of the tentacular power that the company has acquired, a power that she denounces as having been acquired because the American law was not restrictive enough towards the platform. She also denounces a form of data monetization for most of the free services that the company offers and that the low prices that consumers enjoy are only accessible by sacrificing social, competitive and political imperatives. This article will have the effect of a bomb within the American antitrust universe, from now on, the latter will question itself through a self-criticism<sup>28</sup>, on how the American antitrust law has allowed such a monster to happen? Faced with this nagging question and this painful observation, the authorities have decided that it was time to intervene, and Amazon will be one of the first targets of this awakening of the American antitrust.

- b. The Federal Trade Commission in charge of the first charge against Amazon.

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<sup>27</sup> L. Khan, Amazon's Antitrust Paradox: 127 Yale L.J. 710, 2017. - The new Brandeis Movement: America's Antimonopoly Debate: European Competition L.& Practice, 131, 2018.

<sup>28</sup> D. Streitfeld, Amazon's Antagonist has a Breakthrough Idea: The New York Times, September 7, 2018.

<sup>29</sup> E. Conesa, "Facebook, Apple and Amazon also in the crosshairs of US antitrust," Les Echos, June 3, 2019.

Faced with this surge in antitrust law, the U.S. justice system has been methodical and has divided the task of regulating the GAFAs. The Department of Justice will take care of Google and Apple, while the Federal Trade Commission (FTC), the other American competition watchdog, seems to have the task of taking care of Facebook and Amazon<sup>29</sup>.

In 2019, the FTC will begin its in-depth work on the thorny case of Amazon, which will be a first for the company that has never had to face such investigations in the United States or in Europe (at least at the community level). This investigation will have a global approach in the first place in order to observe if the rumors of anti-competitive practices of the company are confirmed<sup>30</sup>.

It is in 2020 that the trouble will really start for the American firm. The investigation has indeed taken a major turn<sup>31</sup>, as announced by the media "Bloomberg": "*Amazon's Market Power to be investigated by New York AG*"<sup>32</sup>. The article explains that the attorneys general of New York and California have joined the FTC to investigate Amazon's Marketplace. The investigation will be conducted by the combination of the three agencies, and thus

<sup>30</sup> T. Romm, "Amazon could face heightened antitrust scrutiny under a new agreement between U.S. regulators," The Washington Post, June 2, 2019.

<sup>31</sup> M. Rochefort, "Antitrust investigation against Amazon takes major turn," August 5, 2020.

<sup>32</sup> S. Soper, "Amazon's Market Power to be investigated by New York AG," *Bloomberg*, August 3, 2020.



the possibility of a large-scale investigation as announced by Diana Moss, president of the American Antitrust Institute: "*This seems to be taking the form of what could be a major collaborative antitrust investigation. This happens in big cases where the feds have an interest in enforcing the law, and also where states have an interest in protecting their constituents*".<sup>33</sup>

But now the investigation begins to narrow its focus on potential anti-competitive practices of the company. In this case, Amazon could be accused of having exploited information from third-party sellers on its site in order to design their own products and sell them through the subsidiary "Amazon product" on the Marketplace of the company from which it retrieves the information. This practice, if proven, could constitute an abuse of dominance under U.S. antitrust law.

Amazon is also an unprecedented monopoly on e-commerce, and has been strengthened by the Covid19 crisis, which has been a real eye-opener as to the economic reality of these companies.

- c. Washington attacks the company on a new front.

It is on May 25, 2021, that a new battle will begin for the company of Seattle. It is through the social network Twitter (it seems

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<sup>33</sup> S. Soper, "Amazon's Market Power to be investigated by New York AG," *Bloomberg*, August 3, 2020.

that it is customary for political and legal figures in the United States to use this social network for important announcements), that the prosecutor of the U.S. capital has announced to launch proceedings against Amazon for interference with competition in online trade<sup>34</sup>. In his Tweet, Karl Racine states that "*Amazon has used its dominant position in the online retail market to win at all costs. It maximizes its profits at the expense of 3rd party sellers & consumers forced to pay artificially high prices, while harming competition & innovation & illegally tilting the playing field.*

What is reproached here to the American firm in this new case is to prevent companies from selling their products cheaper elsewhere than on its platform, it will also come to form the claim of damages and measures to prohibit this type of practices in the future. The latter aims in particular the clauses of tariff parity in the contracts with the third-party merchants users of the platform by prohibiting them to offer their goods at lower prices on other site. This is a new accusation against Amazon, which is accused of abusing its dominant position. This situation of contractual problems is not new for the company which had already to answer for this practice in front of the Bundeskartellamt.

One would think that Amazon could solve the problem as easily as in Germany,

<sup>34</sup> AFP, "USA : Amazon poursuivi pour abus de position dominante", *Le Figaro*, May 25, 2021.



but several problems arise in this situation. For the time being, only Washington is concerned, so prosecutions remain limited. But as we have seen with the first investigation of the company, it is possible that a coalition against the company could be created. Especially since the FTC appointed a new recruit last March.. Indeed Joe Biden announced on March 22 the appointment of Lina Khan as a new commissioner within the FTC<sup>35</sup>. Amazon's best enemy is therefore in the ranks of the Authority that is in charge of regulating the Seattle company, this is undoubtedly a sign of a potential rallying of the FTC to the procedure that Karl Racine has launched. Secondly, what could pose a serious problem for Amazon is the fact that the prosecutor is claiming damages for all the companies that were biased by this practice, a major procedural element that makes it extremely difficult to reach an agreement as was the case with the German Authority.

So, it's official, Amazon is in a delicate situation on both sides of the Atlantic. In the United States, both the states and the federal authorities are after them, in Europe it's similar, both the European Commission and the national competition authorities are after them. And on each continent the company has a better enemy, Lina Khan in America and Margrethe Vestager in Europe.

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<sup>35</sup> The White House, Press Release, "President Biden Announces his Intent to Nominate Lina Khan for Commissioner of the Federal Trade Commission," March 22, 2021.

### **III. Global and comparative analysis of the different procedures.**

The company is overwhelmed from all sides, in Germany, before the Commission, before various American states and the Federal Trade Commission. Amazon is surrounded by procedures, by increasingly hard and repeated phases of investigation, two Commissioners who do not appreciate GAFAM and their monopolistic power. The company does not show any fear, but it can tremble, and this for different reasons.

First of all, the Commission has never condemned Amazon, and we know that in recent years there has been a certain willingness to dissuade anti-competitive practices of platforms through excessively high fines, as evidenced by the 8 billion euros that Google had to pay in three years. Moreover, the practice of which the company is accused is a form of self-preferencing, a practice that the Commission disapproves and strongly sanctions. It is therefore plausible that the company must face a record fine, some observers speak of a figure of 23 billion euros<sup>36</sup>. Indeed, in Europe, as provided for in Regulation 1/2003 for the calculation of fines, the latter in case of anti-competitive practices can go up to 10% of the

<sup>36</sup> M. Hanbury, "The EU just launched a big antitrust probe into Amazon, and it could lead to a fine of up to \$23 billion," *business insider*, July 17, 2019.

turnover of the company concerned. Amazon has a global turnover of 233 billion euros, so there is a chance that a historic and unprecedented fine could be imposed.

The commission is not the only problem for Amazon in Europe, the Bundeskartellamt is also giving cold sweats to the American firm, the first major competition authority to have found anti-competitive practices of the company. It is also the first competition authority to investigate one of the GAFAs with new powers adapted to digital companies, an expanded investigation on all of Amazon's practices, an investigation that could reveal new practices that are not yet known by any competition authority. It is only at the German level that the company can worry for now, but the Digital Market Act envisaged by the European regulator could well make the EU competition investigations, which have already caused serious problems for all GAFAs, take on a much greater scope.

Out of the Atlantic in the United States, the will to regulate GAFA is still very young, we have no hindsight on the treatment that will be reserved to the American company. But this does not bode well as Joe Biden, the new American President, seems to be in favor of regulating GAFA, and the authorities are becoming more and more

efficient in their organization for investigations. The States working hand in hand with the FTC allowing more thorough investigations, Lina Khan new commissioner at the FTC, a 400-page report that calls for the dismantling of GAFA<sup>37</sup>. We have gone from a tetanized antitrust law to an extreme desire to destroy and disappear these entities that were previously untouchable.

#### IV. Conclusion.

The party seems to be over for GAFA, now surrounded by many authorities, soon to be taxed globally following the historic agreement obtained by the G7<sup>38</sup>. The turn that antitrust law is taking at the global level seems somewhat worrying. While in Europe we have not been able to welcome and regulate them as we should have, we now have to face a protectionism that some authors do not hesitate to qualify as demagogic<sup>39</sup>. In the United States, we have gone from one extreme to the other, from total passivity to the most extreme will. But are all these doctrines and wills of ultra-strict regulations the most efficient? The GAFAs, beyond their practice, are incredible generators of competition and innovation, but also companies that will provide a living to millions of other economic actors.

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<sup>37</sup> J. Pimenta, "Antitrust report: Congress wants to dismantle GAFA," *Digital Century*, October 8, 2020.

<sup>38</sup> V. Adam, "G7 a landmark agreement a GAFA tax of at least 15%", *Boursier.com*, June 5, 2021.

<sup>39</sup> D. Bosco, "The regulation of American platforms is a trap for European antitrust", *LexisNexis, Contrats Concurrence Consommation n°12*, December 2018, marker 11.

Dismantling them would kill a part of the economy, but it would also leave room for other economic powers like Asia, which tends more and more to create economic "champions" that can compete with the GAFA.

As we have seen with the case of the very first proceeding that Amazon faced, it is possible to discuss and find soft solutions that benefit everyone, rather than constantly

wanting to be in the violence of condemnations and sanctions. Another path is possible for antitrust, as the one currently being taken risks bringing the Western economy into critical situations.

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