RELATIONSHIPS BETWEEN PLATFORMS AND RETAILERS (ON THE EXAMPLE OF AMAZON)

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Abstract: In e-commerce, data has long played a special role as a factor in competition between different players, and its importance continues to grow. A review of the current legal situation is a basic prerequisite for any legal policy proposals to improve market access conditions and thus competition in a platform economy. As a result, the current article attempts to discuss the legal framework that governs the relevant legal relationships between platforms and retailers on the example of Amazon. The emphasis is on the scope of retailers' antitrust claims against online platforms, as well as the extent of platforms' obligations. Participation and access claims relating to data or information, as well as certain marketing services, are particularly relevant in this regard.

Keywords: antitrust; data sharing; essential facilities

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INTRODUCTION

Digitization makes a fundamental change in society that is continuously taking effect over a long period of time. Digitization triggers numerous other developments that also have an impact on the economy and society, such as the smartphone, the sharing economy, and digital platforms. Data[2] is thus a competitive factor. The concentration of data thus has the potential to monopolize markets, to solidify market structures, and to disrupt the functioning of competition. With increasing market concentration, there is a growing need to make data usable for a larger group of addressees. The special role of data in the digital transformation is supported and in some cases reinforced by its economic properties. From an economic perspective, data has the following characteristics:

- non-rivalry in consumption: data is not rival in consumption. That is, they cannot be used for only one purpose and then be consumed, but the same data set can be used at the same time by different actors for different purposes.

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[2] ANDRAŠKO, J. – MESARČÍK, M. Quo Vadis Open data? *Masaryk University Journal of Law and Technology*. 2018, No. 2, pp. 179–219.

- Excludability: The owner of a data record, who exercises actual control over it, can exclude other users from consumption by denying access to data. In this way, data can be monetized on the one hand. On the other hand, collecting data becomes economically attractive.[3]

While the non-rivalry of data in consumption indicates that data is not a scarce resource, excludability works in the opposite direction. The distinction between syntactic and semantic data is critical in this context. The data syntactic level only refers to the stringing together of zeros and ones. The semantic level, on the other hand, focuses on the data's concrete meaning, or the information that can be extracted from it. On a semantic level, intellectual property rights can certainly exist and be enforced. While no one can thus be excluded from collecting data, exclusion is possible in the case of information or databases generated from it.[4] The latter are understood to be data arranged systematically or methodically, where individual elements of the database can be accessed as needed. Even in the case of databases, it is precisely not the individual elements (data points) that are protected, but only the database as a whole and thus the effort required to create it.

Data can be used positively in a variety of ways by several users at the same time. However, access to the pertinent data is first required in order for this to actually occur. Digital platforms are crucial for data collection: A digital platform has access to the corresponding data of all its user groups because it serves as an intermediary between various user groups.[5] This typically means that they can use the data for their own commercial success in addition to processing transactions between users on the platform and third-party retailers. This is especially true for vertically integrated platforms like Amazon that, in addition to brokering transactions between parties, also act as retailers or service providers.[6]

Potential market-dominant platform practices in this context initially relate, for instance, to the fact that the platform determines presumably successful products, including a corresponding price, through the evaluation of data, then offers them on its own, and excludes retailers with similar products altogether or only after a delay. Additionally, it allows for the selective transfer of data and information to specific providers, giving them a competitive edge over rivals who lack the necessary resources. Additionally, a retailer's commercial success is also influenced by how prominently its products are presented to customers who conduct product searches. The platform can effectively affect its own sales by choosing which data is displayed to consumers as well as which data is included in the ranking. The platform may be able to influence competition in this way.

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[3] FUNTA, R. – KLIMEK, L. Data and e-commerce: an economic relationship. *Danube*. 2021, Vol. 12, No. 1, pp. 33–44.

[4] KARÁCSONY, G. Managing personal data in a digital environment – did GDPR's concept of informed consent really give us control? In: FUNTA, R. (ed.). *Computer law, AI, data protection & the biggest tech trends*. Brno: MSD, 2019, pp. 39–50; ŽÁRSKÁ, P. Databases consisting of personal data: promising financial opportunity for member states? *The Lawyer Quarterly*. 2022, Vol. 12, No. 2, pp. 159–172.

[5] FUNTA, R. Economic and Legal Features of Digital Markets. *Danube*. 2019, Vol. 10, No. 2, pp. 173–183.

[6] FUNTA, R. Amazon a presadzovanie antitrustového práva [Amazon and antitrust law enforcement]. *Justičná revue*. 2018, Vol. 70, No. 11, pp. 1215–1229.

The European Commission has started proceedings to determine whether Amazon abuses the information gathered on Amazon Marketplace to gain a competitive advantage.[7] In any case, it is claimed that even prior to the start of the legal proceedings, there were concerns about the rising costs for data access and advertising services. In the event of abuse of a dominant position, access claims for the data collected by a platform can in principle arise from national and European antitrust law.[8] According to Article 3(1) Regulation 1/2003, both legal regimes are to be applied alongside each other, whereby the Member States may enact and apply stricter national competition law[9] to prevent unilateral actions (Article 3(2) Sentence 2 Regulation 1/2003). If the facts of Article 102 TFEU are fulfilled, the European Commission can oblige the dominant company to put an end to the infringement. Both in the Member States and at the European level, data sets and their accessibility have already been the subject of official decisions and court rulings.[10] Another example concerns a decision by the European Commission, which recognized the sharing of data as a solution to an antitrust problem in the context of merger control.[11]

In the following we discuss the legal framework that governs the relevant relationships between platforms and retailers. In order to determine the antitrust potential for eliminating the competitive challenges, it is discussed below whether and to what extent Amazon has a dominant position in the market. The emphasis is on the breadth of retailers' antitrust claims against online platforms and the extent of platforms' obligations. In this regard, participation and access rights relating to data or information, as well as certain marketing services, are particularly relevant. At the end we also discuss approaches to dealing with the digital platform economy.

AMAZON AS DOMINANT MARKET PLAYER

To determine whether Amazon has an antitrust dominant position, the relevant criteria for determining such a position must first be identified. The assessment of whether Amazon meets these criteria will be based on the fact that Amazon is a platform for retailers, provides services to sellers on its marketplace, and acts as a retailer itself. This means that it must be determined whether and to what extent these markets must be considered separately or analyzed as a whole. A dominant market position entails a special responsibility for a company not to impair competition on the corresponding

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7 European Commission, AT.40462 Amazon Marketplace and AT.40703 Amazon – Buy Box.

8 MISKOLCZI-BODNÁR, P. Visszaélés gazdasági erőfölénnyel [Abuse of Economic Dominance]. In: TÓTH, A. – JUHÁSZ, M. – JUHÁSZ, D. (eds.). *Kommentár a tisztességtelen piaci magatartás és versenykorlátozás tilalmáról szóló 1996*. évi LVII. Törvényhez: Gazdasági Versenyhivatal, 2014, pp. 280–320.

9 MISKOLCZI-BODNÁR, P. Indemnification and harm caused by infringement of Antitrust rules from Private Law point of view. In: OSZTOVITS, A. (ed.). *Recent developments in European and Hungarian competition law*. Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2012, pp. 26–40.

10 French Competition Authority, Decision No. 14-MC-02 of 9 Sep. 2014 relating to a request for interim measures presented by the company Direct Energie.

11 European Commission, decision of 02/19/2008, COMP/M.4726 – Thompson Corporation/Reuters Group.

or, if applicable, an adjacent market through its actions. Reduced to the essentials, it follows from the dominant position that this position must not be exploited to the detriment of others.

Any antitrust analysis must begin with a definition of the market because a dominant position can only be established by defining a market that is both substantively and geographically relevant in terms of antitrust law.[12] The market power concept states that the relevant action must have an impact on the market in question. The market's definition reflects the substitutability, or replaceability, of the related goods or services. Only when the corresponding economic goods can be sufficiently substituted does competitive pressure develop.

High market shares over a long period of time are often an indication of a dominant position. The ECJ and the General Court assume that a particularly high market share is more than 50 percent. From a market share of around 40 percent, a dominant position can be assumed if there are additional circumstances, e.g., a high market share gap to the next largest competitor.[13] However, a thorough examination of market conditions is also required. This includes an assessment of the market structure, market participant behavior, and actual market results, as well as costs of market entry for third parties and other barriers to market entry. There is a scarcity of data available to determine Amazon's precise market share. Nonetheless, legally relevant conclusions can be drawn from the available data, especially because the available data suggest reliable minimum market share values. With the digitalization of the economy and the emergence of platforms that collect user data on a large scale, the question of the significance of any "data power" for a company's dominant position has become the focus of antitrust debate. As a result, the combination of market shares and platform economy special conditions, particularly strong network effects and data potential, gives Amazon Marketplace a dominant market position.[14]

DATA COLLECTIONS AS ESSENTIAL FACILITIES

Access to data can be seen as the key to participation in the economy. In the context discussed here, the following categories of data are particularly relevant: Customer identification and contact data, data relating to individual transactions, data on business performance, user behavior, and analyses of market trends and development.

The availability of this data has a number of advantages, including the ability to precisely adjust pricing and supply as well as a detailed overview of specific click counts or

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[12] KINDL, J. – KUPČÍK, J. – MIKEŠ, S. – SVOBODA, P. *Soutěžní právo* [Competition Law]. Praha: C. H. Beck, 2021.

[13] WHISH, R. – BAILEY, D. *Competition Law*. Oxford: Oxford University Press, 2021.

[14] Amazon.com offers both one-sided and two-sided selling strategies. Amazon (essentially) buys at a wholesale price and sells at a retail price for some goods, such as books. This can be considered a one-sided model. For a variety of other products, Amazon provides a web portal allowing a manufacturer to determine the retail pricing that a consumer will see.

demand fluctuations. Therefore, the data collection could be considered as an essential facility to which there is a right of access under antitrust law.[15]

A dominant company acts abusively if it refuses to grant another company access to its own networks or other infrastructure facilities for a reasonable fee if the other company is not able to use the downstream market as a competitor of the dominant company. However, there is no abuse if the dominant company proves that shared use is "not possible or not reasonable". First of all, the existence of two markets is necessary: On the one hand, there must be a (hypothetical) market for the use of the infrastructure facility, and on the other hand, there must be upstream or downstream market. This may not be a single market, but the markets must be related to each other. In the case of Amazon, the market around the use of e-commerce data represents the infrastructure facility market, while the downstream market is the market for the commercial online sale of goods. On this, the Marketplace dealers are in competition with Amazon Retail.[16]

The prohibition of abuse is aimed at companies with a dominant market position. It seems convincing to assume that a dominant position on the market for shared use of the infrastructure is sufficient. So far, however, it has been completely unclear how a market delimitation of this kind could look on data markets. It would make sense to limit the market to data that is relevant for e-commerce. Companies like Google and Facebook also collect large amounts of data. Whether, from the point of view of data users, they are a substitute for the data collected by Amazon and should therefore be counted as part of the same market cannot be answered in the abstract. Although Amazon has diversified its offering, its business model suggests with a certain degree of probability that the proportion of data relevant to e-commerce in Amazon's data pool is significantly higher than in other companies with data-based business models that collect more heterogeneous data. At this point, it will also be necessary to differentiate between different categories of data. In the market for data that allows users to be divided into target groups or that relates to their interests, a dominant position is less likely than in the case of data that is related to specific purchases or that provides highly topical feedback on user behavior (e.g., viewing a specific article). Amazon's market share in the market for sales platform services provides an indication of a dominant position. Further clarification is also needed as to whether market shares and the usual thresholds are suitable criteria for determining market power in markets around the use of data.

The narrowest criterion of an essential facility is the requirement of non-substitutability. A facility is only non-substitutable if access to the neighboring market is impossible without access to the facility. In this context, it is not sufficient that market access is merely facilitated or accelerated through the use of the infrastructure compared to other access options. Rather, the use of the facility must be essential for market access. On the other hand, it is not necessary to prove that the refusal eliminates all competition;

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[15] FUNTA, R. Data, their relevance to competition and search engines. *Masaryk University Journal of Law and Technology*. 2021, Vol. 15, No. 1, pp. 119–138.

[16] Amazon Retail acts like another, albeit very large, retailer on the marketplace. Amazon Retail itself is not a platform. As a retailer, Amazon keeps the inventory of goods itself. The only user group in this case are the end customers. In principle, they can see whether they are buying from a retailer on Amazon Marketplace or from Amazon itself, but the two different branches of Amazon are fundamentally closely interlinked.

rather, the refusal must only be suitable for eliminating all effective competition. The existence of marginal activities by competitors in "market niches" does not refute this suitability.[17] Unlike products that depend on a specific informational input, such as software that is based on an operating system and must be compatible with it, data in e-commerce has a supplementary function. It is used in particular for marketing purposes or to optimize the range. However, just because data access improves the market position of external retailers does not make it mandatory for participation in the downstream market. However, things could be different if there was access to the market without data access, but the access tenant could not in fact act as an effective competitor. Without data access, Marketplace merchants may not be commercially viable competitors and may not exert effective competitive pressure on the dominant entity. With better access to data giving Amazon information about its competitors and their customers, the platform could gain a unique, uncatchable advantage that would make it impossible for Marketplace merchants to compete successfully.[18] The extraordinarily valuable real-time or near-real-time data (X has put product Y in the shopping cart at the moment) is of particular importance, as it allows the customer to be addressed effectively. This applies to a greater extent to real-time location data, insofar as these are permitted to be used. The value of the corresponding knowledge and information is time-related. However, as long as retailers are generally successful in the market, it seems questionable overall, despite some indications of significant disadvantages in market presence, whether authorities and courts would establish a substantial facility in Amazon's data inventory or part thereof on the basis of lack of substitutability. This does not mean that independent retailers would have an equal opportunity to compete, i.e., that there would be a "level playing field", but rather only that the narrow requirements of substantial facility with respect to are not likely to be fulfilled with regard to the data stock.

Article 102 TFEU does not expressly regulate the case of denial of access to an essential facility. However, the case law of the European courts as well as statements by the European Commission provide criteria for determining when an abuse of a dominant position by denial of access can be assumed. Here, too, two different markets must first be present,[19] whereby it is sufficient if only one potential market exists for the infrastructure facility, i.e., the owner has so far used it exclusively themselves.[20] The defendant must hold a dominant position on the market for the infrastructure facility. The term "necessary facility" is to be understood broadly and can include a wide variety of input goods, so that a database can also be a corresponding facility.

The further requirements for the application of the essential facilities doctrine in the context of Article 102 TFEU are the ability to eliminate competition on the downstream market, the absence of actual or potential substitutes for the facility, and the lack of

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[17] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, T-201/04, *Microsoft Corp. v. Commission of the European Communities*, EU:T:2007:289, point 563.

[18] BELLEFLAMME, P. – MARTIN, P. Platform Competition: Who Benefits from Multihoming? *International Journal of Industrial Organization*. 2019, Vol. 64, No. 64, pp. 1–26.

[19] NIELS, G. – RALSTON, H. Two-sided market definition: some common misunderstandings. *European Competition Journal*. 2021, Vol. 17, No. 1, pp. 118–133.

[20] Judgment of the Court (Fifth Chamber) of 29 April 2004, C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, EU:C:2004:257, point. 44.

objective justification for the refusal.[21] Alternatives that are clearly less advantageous to the competitor also remove the indispensability of access. Insofar as the general criteria should be fulfilled in specific segments due to special circumstances of the individual case, the additional question arises as to whether a claim for access requires the creation of a new product. The European courts have already ruled on this question several times in the context of the claim to use an intellectual property right. A license refusal as such is not an abuse of a dominant position. Exercising an exclusive right in a certain way can constitute abusive behavior.[22] Exceptional circumstances (and thus an abuse of market power) are justified by preventing the emergence of a new product for which there was a consumer demand.[23] A company's conduct is already abusive if three conditions are cumulatively met. One of these conditions is the prevention of "a new product" for which there is potential consumer demand.[24] The background to the discussion about preventing a new product is the balancing of interests between the protection of intellectual property and participation in competition. The latter, according to the logic, can only prevail if market development is prevented to the detriment of consumers. According to the corresponding idea, it should not be sufficient for an abusive refusal that the company requesting access limits itself to offering the same products that are already offered by the owner of the intellectual property right.[25] It is essential that the additional criterion was applied only in cases involving access to resources protected by intellectual property rights. The access claim should only need special justification because the right to exclude represents the "core substance" of these rights. All of this speaks in favor of not applying the requirement of the new product where data is concerned that are not subject to intellectual property rights.

However, the European Commission does not assume that a new product must necessarily be prevented, rather that the indispensability of an input for the exercise of the activity in question should be sufficient.[26] According to this, a new product is only one factor within the framework of a comprehensive weighing up of interests. Unlike in *Magill* and *Microsoft*, it is not about making specific information available as a raw material for a product of one's own, but about making data accessible as a starting point from which to derive one's own market opportunities. Unlike in the *Magill* case, moreover, no "information product" is offered by the retailers themselves, for which the relevant data form the raw material. The data and the information to be gained from

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21 Judgment of the Court (Sixth Chamber) of 26 November 1998, C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, Mediaprint, EU:C:1998:569, point. 41.

22 Judgment of the Court (Sixth Chamber) of 26 November 1998, C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, Mediaprint, EU:C:1998:569, point. 43.

23 Judgment of the Court of 6 April 1995, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities*, EU:C:1995:98, points 50 and 54.

24 Judgment of the Court (Fifth Chamber) of 29 April 2004, C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, EU:C:2004:257, point. 38.

25 PARKER, G. – PETROPOULOS, G. – VAN ALSTYNE, M. *Digital platforms and antitrust*. Working Paper 06/2020. Brussels: Bruegel, 2020, pp. 1–31.

26 Commission Decision of 3 July 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/38.044, NDC Health/IMS Health: Interim measures) (notified under document number C(2001) 1695).

it are not intended to be used to copy products from Amazon Marketplace or Amazon Retail or the platform as a whole, but rather to provide the basis for successfully offering one's own products. In the *Microsoft* case, the ECJ allowed precisely this statement to suffice.[27] Moreover, the mere and incidental collection of data by an e-commerce platform[28] does not appear to be a particularly innovation-driven or investment-requiring activity. Accordingly, it is not to be expected that granting access would remove significant incentives for innovation. The requirement of a new product should therefore not be invoked if the data set represents a barrier to market entry for other companies. Overall, it can be said that the assumption of an essential facility in the form of data collection by Amazon appears theoretically possible in accordance with the provisions of European antitrust law, but is unlikely to be enforceable in practice, primarily due to the strict requirements regarding the lack of substitutability. In its current form, the essential facilities doctrine in European antitrust law is therefore not a sufficient basis for enabling third-party dealers to participate fairly in competition.

PLATFORMS AS ESSENTIAL FACILITIES

Instead of access to data, the focus could be on retailers' access to platforms as essential facilities. The reasoning behind this is that if access to platforms is denied to retailers, they may not be able to compete in the downstream e-commerce market because they may be so fundamentally dependent on platforms to sell their goods. Platforms play a special role in facilitating economic activity in e-commerce because self-distribution does not provide a financially viable alternative, particularly for SMEs. However, our investigations show that the narrow antitrust criteria[29] for the existence of an essential facility are unlikely to be regarded as fulfilled. In the case of e-commerce platforms, non-duplicability can be justified in particular on the grounds of economic impossibility. In most cases, an objective standard is assumed, so that it should not be possible for a third company to enter the market. This is the case if the establishment of a further facility is absolutely unreasonable from a commercial point of view. However, positive network effects must also be taken into account in the assessment, which in turn lowers the take-up threshold somewhat. There are indications that network effects can be so strong that a facility cannot be duplicated even by a similarly strong competitor. This is indicated by the case of the social network Google+, which was unable to establish itself alongside Facebook despite being part of the Google Group. The same can be assumed for Amazon in the meantime. In addition, the facility must not be substitutable. First of all, selling via Amazon Marketplace is of course not the only way to sell goods (online). Other platforms or online shops also allow access to customers, but online

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[27] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, T-201/04, *Microsoft Corp. v. Commission of the European Communities*, EU:T:2007:289, point. 656.

[28] PERÁČEK, T. E-commerce and its limits in the context of the consumer protection: the case of the Slovak Republic. *Juridical Tribune*. 2022, No, 1. pp. 35–50.

[29] ŠMEJKAL, V. Výzvy pro evropský antitrust ve světě vícestranných online platforem [Challenges for European antitrust in a world of multilateral online platforms]. *Antitrust*. 2016, Vol. 8, No. 4, pp. 105–114.

platforms act as increasingly important intermediaries for transactions.[30] At the same time, there are strong indirect network effects on platform markets, so that companies are ultimately dependent on few or even one online platform when it comes to access to markets and consumers (gatekeeper function of intermediary platforms).

As a benchmark, it is worth taking a look at Google as a search engine: Although various search engines are available to the user, these alternatives are hardly relevant in practice. One particular provider was able to establish itself as the standard. This circumstance in turn characterizes the market for advertisers on search engines; they have in fact only one option, although in theory users could easily use another search engine. In this context, the understanding of materiality may need to be adjusted. With regard to Amazon, the question arises as to whether Marketplace has become the standard for end customers to a similar degree. Using other distribution channels involves losing the benefits offered by the dominant platform and may not represent an effective distribution alternative.[31] As a result, however, the position of the retailers is not so without alternatives that, applying the traditional criteria of antitrust law, it can be assumed that there is a substantial establishment with corresponding consequences for freedom of contract. If the trends of the past years continue, however, it is to be expected that the antitrust threshold will be reached in the next few years and that retailers will in fact no longer have any reasonable sales alternatives. Assuming that the Amazon Marketplace platform already embodies an essential facility today, this would mean in practice that Amazon would have to enable every independent retailer to sell products on fair terms via the platform and not refuse them the use of the platform without justifying reasons. However, this does not necessarily mean that Amazon is obliged to make all data or only parts of this data accessible, since this only affects access to the platform as such. The database is part of the facility and the basis for its functioning.[32]

MARKETING SERVICES AS AN ESSENTIAL FACILITY

Rather than relying on the data set or access to the marketplace in general, Amazon's marketing services could be viewed as an essential facility, i.e., those services that Amazon uses to better market products on the platform. This can include pricing algorithms, website placements, and purchase recommendations. In practice, Amazon runs merchandising and promotions for third-party products. Amazon also makes unilateral decisions on ad placement; for example, special positioning or ranking is not guaranteed, and ads can be changed or removed at its discretion. As a result, Amazon is no longer a "neutral" provider of marketing services over which retailers can exert decisive influence or purchase any services. Instead of a right to access, Amazon

[30] Judgment of the Court (Sixth Chamber) of 26 November 1998, C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint*, EU:C:1998:569, point. 43.

[31] FEDUSHKO, S. – MASTYKASH, O. – SYEROV, Y. – PERACEK, T. Model of user data analysis complex for the management of diverse web projects during crises. *Applied Sciences*. 2020, Vol. 10, No. 24, pp. 1–12.

[32] PLAVČAN, P. – FUNTA, R. Selected Legal Aspects of Protection of Undistorted Competition in the Digital Economy. *Studia Iuridica Lublinensia*. 2022, Vol. 31, No. 1. pp. 25–41.

Marketplace retailers could assert a right not to be discriminated against and thus disadvantaged in competition – including Amazon's own retail business.

DISCRIMINATION BY A DOMINANT COMPANY

It can be assumed that such a claim to equal treatment follows from Amazon's dominant position, as this entails the special responsibility not to impair competition. As a result, Amazon Marketplace must grant independent retailers all marketing and sales opportunities that Amazon Retail uses to sell its own products. In the present case, the dominant company has already voluntarily decided to open its facility and contract with other market participants. In the case of an essential facility, on the other hand, it is about a refusal to enter into contractual relationships in the first place, so that an obligation to do so represents a stronger intervention. In addition, the dominant company has the right to stop the discrimination by only using the facility exclusively. This fallback option is not open to the owner of an essential facility. In addition, a vertically integrated platform provider benefits from the competitors on the platform: the opening results in a more comprehensive product range, the possibility of evaluating the data in connection with transactions of third-party dealers to improve their own offer and the potential for new product ideas and innovations. The corresponding requirements for the behavior of the market dominator therefore also appear justified insofar as the requirements of an essential facility are not met.[33]

It follows first of all that a market-dominant platform such as Amazon Marketplace, which grants data access or certain marketing services, may not discriminate between individual contracting parties if this would result in a competitive disadvantage.[34] Of particular relevance is the question of whether and to what extent "self-advocacy" is equivalent to discrimination against various third-party companies. The decision in the *Google Shopping* case can be used as a comparison, in which a preferential presentation of one's own service is addressed. This preferential treatment was not specifically treated as discrimination or classified in another existing group of cases but was examined in general as an abuse of a dominant position.[35] At the starting point, there is also no general obligation not to favor oneself. However, an individual case analysis can certainly show that such behavior leads to impairments of competition and should ideally be addressed via the prohibition of discrimination. Article 102 (c) TFEU does not rule out applying the case group of discrimination even if a vertically integrated company is affected that treats trading partners and its own services differently.[36] The European

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[33] HALÁSOVÁ, Z. – GREGUŠOVÁ, D. – PERÁČEK, T. eIDAS Regulation and Its Impact on National Legislation: the Case of the Slovak Republic. *Administrative Sciences*. 2022, Vol. 12, No. 4, p. 187.

[34] FUNTA, R. Social Networks and Potential Competition Issues. *Krytyka Prawa*. 2020, Tom 12, pp. 193–205.

[35] European Commission, Decision of June 27, 2017, AT.39740 – *Google Shopping*.

[36] OSZTOVITS, A. Quantifying Harm in Action for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union – Some Remarks on the Draft Guidance Paper of the European Commission. In: OSZTOVITS, A. (ed.). *Recent developments in European and Hungarian competition law*. Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2012, pp. 41–54.

Commission has already assumed that discrimination can also exist if a customer of the dominant company is at a competitive disadvantage compared to the dominant company itself.[37]

The European Commission referred to illegal competitive advantages for Google and did not examine whether Google constitutes an essential facility. In the *Google Shopping* case, the European Commission focused in particular on the prominent display of Google's own service compared to competing service providers. This, according to the decision, would have a detrimental effect on competition: There would be a potential for market foreclosure, competition on the merits would be disturbed, and Google would grant itself advantages resulting from a market-dominant position. All of this is transferable to the situation of Amazon Marketplace and suggests that self-advocacy can in any case in principle also be taken up as discrimination.[38] It should also be borne in mind that platforms have a regulatory function because, as intermediaries, they set rules for their users. Because of this function, it is their responsibility to ensure fair, unbiased, and user-friendly competition on their platforms. The respective rules must not be exclusionary or discriminatory in a way that impedes competition, and the dominant platform must not use its ability to set rules to determine competitive outcomes.[39] An antitrust assessment that rightly focuses on this rule-making function allows for a disentanglement from the criteria for the existence of an essential facility. Irrespective of the criteria for an essential facility, self-benefit can therefore also be abusive if there is no reason to promote competition behind it and a transfer of market power is possible. Positively formulated, the prohibition of discrimination thus results in a requirement of equal treatment: Amazon Marketplace must treat independent retailers in the same way as it treats its own retail division, regardless of whether access to data or marketing services is involved. Circumvention of these requirements must also be considered abusive.

CONCLUSIONS

European antitrust law offers the potential to stimulate competition on e-commerce platforms by granting platform participants a right to access certain data of the platform operator.[40] Thus, this potential must also be used by the authorities and courts. On the one hand, the agreements between Amazon and the Marketplace retailers that allow Amazon Retail to analyze and use data from external retailers were examined, and on the other hand, the significance of the data in the selection of products for the so-called "Buy Box". Recent European Commissions' legal actions resulted in some

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[37] European Commission, Decision of October 20, 2004 – *BdKEP*, point. 93.

[38] ŠMEJKAL, V. Concentrations in Digital Sector – A New EU Antitrust Standard for "Killer Acquisitions" Needed? *Intereulaweast*. 2020, Vol. 7, No. 2, pp. 1–16.

[39] CRÉMER, J. – DE MONTJOYE, Y.-A. – SCHWEITZER, H. *Competition Policy for the Digital Era*. Brussels: Directorate-General for Competition, 2019, p. 62.

[40] ŠRAMEL, B. – HORVÁTH, P. Internet as the communication medium of the 21st century: do we need a special legal regulation of freedom of expression on the internet? *The Lawyer Quarterly*. 2021, Vol. 11, No. 1, pp. 141–157.

changes.[41] E.g., in the Amazon Marketplace investigations Amazon has agreed not to exploit confidential third-party seller information in competition with those retailers. On the other hand, in Amazon – Buy Box investigations, the claim is that Amazon's own retail operation, as well as marketplace sellers who utilize Amazon's logistics and delivery services, are unfairly favored by the rules and criteria for the Buy Box and Prime. Amazon has six months to carry out the commitments. The commitments solely apply to the European Economic Area and have no influence on Amazon's activities anywhere else in the world. That implies that they will have been in operation for several months before they must comply with the requirements of Articles 5 and 6 of the Digital Markets Act (DMA). The importance of the commitments should not be exaggerated because they only apply to third-party sellers and constitute a compromise stance without creating a legal precedent. Anyway, it seems questionable whether Amazon Marketplace or its database would be recognized as an essential facility on the basis of traditional antitrust standards. The antitrust mechanisms should be strengthened, particularly in terms of law enforcement. This may be seen as an effective way to counteract the growing concentration of online markets.

Various options for action can be derived from the legal and economic explanations for Amazon, e.g., creation of data access for all retailers on Amazon Marketplace and/or separation of Amazon Retail from data access on Amazon Marketplace. The aim should always be to create a level playing field for retailers and Amazon Retail. This can be achieved by making access to the data on the Amazon platform correspondingly fair and/or uniform (e.g., through data standardization or splitting up of platform activity). Standardizing data is one way to improve its usability by those with whom it is shared. They can have a positive impact on the functioning of competition in particular, because uniform standards for goods and services reduce dependencies within value chains. Uniform data formats reduce the costs of data evaluation and generally stimulates data trading. Which standards are established, however, is determined in part by the market power of the companies involved. A company with significant market power may be able to set standards for its own benefit and thus influence the competition in its favor in this context. On the other hand, relying solely on the natural evolution of industry standards may not produce the desired result. Another alternative for dealing with market-dominating platforms is the splitting up of platform activity and trading activity. Especially in the European context, the advantages of a complete separation are that complex data protection constructions for data protection-compliant sharing of data can then be avoided. It can also be argued that such a measure represents a greater encroachment on the entrepreneurial freedom of the vertically integrated platform but embodies the more gentle variant in terms of data protection law.

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[41] European Commission, AT.40462 Amazon Marketplace and AT.40703 Amazon – Buy Box.