Libera Università Internazionale degli Studi Sociali Guido Carli

DEPARTMENT OF ECONOMICS AND FINANCE

Bachelor's Degree in Economics and Business

Chair of IO and Competition Theory

"Assessing the Abuse of Market Dominance: an Analysis of the Amazon Case"

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Academic Year 2021/2022

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INTRODUCTION

Over the past two decades, almost like a sudden and unannounced burst, the world has experienced a frighteningly high increase in technology. Never before in history has an invention so disrupted the way we live, and revolutionary inventions, mind you, mankind has known plenty. Not the wheel, with which carrying weights became incredibly easier, nor the compass, with which men understood how to orient themselves, nor the map, nor even the car, indispensable though it still is, can compete with the invention that redrew the boundaries of perception itself. The Internet. In a flash, time has taken on a new form. If, at the beginning of the last century, to communicate with a person, even a few hundred kilometres away, you needed a pen, a sheet of paper and days and days of travel, with a reply that would at best take the same amount of time to get back, with the birth of the Internet magically this distance was reduced to zero. Sending a letter no longer required time, means, money, but just a few moments and an internet device. And we are not just talking about the convenience of not having to wait. We are talking about an astonishing change in the way things were conceived. That letter no longer cost days to deliver, but instants. The content could also be incomplete, as it only took one click to send another. Communication between people (and human beings are frighteningly dependent on communication with their peers to develop) had undergone an unimaginable boost. Of course, you will say, even the telephone allows you to communicate quickly, indeed in real time, and what is more, it allows you to hear the voice of the person you are talking to, unlike an email or a text message. You see though, the Internet has opened the door to a new way of communicating; ideas, images, sounds, sensations. All shared. Not just between two individuals, but with the rest of the world. On the internet, people can have fun, enjoy themselves, learn, cry, and even eat now. How many times have we stopped to watch a video of a cute kitten on our phone, shared it with our friends, and, almost without realising, it had reached thousands of people. And how many times has that same kitten influenced our emotions and feelings even though it may have been on the other side of the globe. The Internet is a world within the world and we are its most faithful inhabitants. The more the Internet grew, the more the tools to use it improved. Smartphones, laptops, televisions and even refrigerators. Everything is networked now. And everything is within our reach. So, following the momentum of this explosion, the way of doing business also changed. Between the 1990s and 2000, many of the companies destined to become the global giants we all know today began to emerge. E-Bay, PayPal, Netflix, are just a few of the hundreds of companies that took advantage of the wave brought by the Internet to revolutionise the world's entrepreneurial model. But one in particular, born in July 1994 from the idea of a small Seattle employee with the aim of selling books, irreversibly changed the balance of world trade. Amazon.com. Since its inception, a quarter of a century ago, the company has experienced exponential growth, which by 2021 amount to almost 470 billion dollars in annual global turnover (just think that a company like McDonald's, the undisputed leader in the food sector and with a much longer history than Amazon, barely manages to reach 25 billions), with shares that have more than doubled in value in the last five years (also due to the pandemic). Moreover, in a world in which now every company, from small start-ups to IT giants operate online, it is impressive to see that Amazon holds almost 50 per cent of global e-commerce and a total value of 1.6 trillion. Buying and selling on Amazon is easy, almost intuitive. However, although it represents a fundamental turning point, the more Amazon's power grew, the more its ability to influence its environment both directly and indirectly, its strenght position, grew. In fact, as we will see further into this thesis, being in a position of dominance is not per se forbidden, but the company in such a role has a special responsibility to keep the competitive equilibrium stable and not to negatively influence the common welfare. In fact, as you are going to discover, an uncontrolled increase in the power of a monopolist often leads to a loss of welfare.

Thus, keeping in mind these premises, we come to the head point of this dissertation. In its decision of 10 April 2019, the AGCM(Autorità Garante della Concorrenza e del Mercato) the Italian Antitrust supervisory body, opened an investigative proceeding against 5 companies of the Amazon group for abuse of dominant position. The purpose of this dissertation is twofold: on the one hand, the choice to deal with this case is extremely relevant because the fine requested by the authority (which amount you will only discover at the end of the paper), is the highest ever issued in Italy and among the 10 highest ever charged in the world, and the proceedings themselves are proof of how much the Italian Antitrust Authority has increased its power, both on the European and global scene. Secondly, I think it is interesting to emphasise how much the proceedings to establish infringement in reality go hand in hand with what is studied in the books, with the AGCM narrowly following every step to arrive at the definition of the infringement. In Chapter 1, therefore, you will find a brief introduction to the concept of dominance and abuse, what is meant by market power and how it is determined, and why it is so important to ascertain whether a situation can be considered abusive or not, with a brief explanation of what the main types of abusive practices are and how they work.

The following chapters, on the other hand, will be entirely devoted to analysing the investigative procedure carried out by the authority in determining Amazon's liability, attempting to describe exhaustively and in detail how the infringement was determined. It is worth noting, as mentioned above, how much the course of the proceedings reflects the theoretical approach to establishing such situations: specifically, Chapter 2 will be an explanation of what Amazon is and how it functions, its characteristics and the services it offers. Chapter 3 will proceed to identify the relevant market in which Amazon operates and the establishment of the dominant position it holds within the Italian market, highlighting the main indicators of such dominance. Finally, in Chapter 4, the scope of the analysis will shift to the assessment of the Abuse and the strategy that Amazon pursued in order to obtain a competitive advantage over the other operators, underlining in the final part the reason why the Authority rejected the Company's defence linked to the introduction of SFP (you will find out what it is later on).

So, without further ado, let's dive into the beginning of this analysis and lay the groundwork for a full understanding of this fundamental case, both for the Italian Antitrust Authority and for the economic world at large.

1. DOMINANCE AND ABUSE

Antitrust law prohibits anticompetitive conduct by a single firm (individual dominance) or two or more firms capable of behaving on the market as a single economic entity (collective dominance). A dominant position is a *condicio sine qua non* for a finding of infringement, however, what is forbidden is not the mere holding of a dominant position, but the abuse of it. The main issue concerns indeed the types of analysis that must be undertaken in order to identify the presence of anticompetitive unilateral practices. US, *Section 2 of the Sherman Act* , *Article 102 TFEU* and, in Italy , *Article 3 of Law 287/90* provide some guidances for a general prohibition of practices that may be constitute an abuse, but the principal concern rises from the difficulty related to the far from simple distinction between an *Aggressive Competitive Conduct*, highly beneficial for consumers, and an *Aggressive Exclusionary Conduct*, deleterious for consumers. There has been a wide and long debate regarding limits and instruments for the antitrust intervention against unilateral exclusionary conduct as well as the possibility of exemption from this practices, and even if article 102 TFEU doesn't directly provide the possibility of exemption for this type of abuses the case law leaves room to the dominant firm for the demonstration of an objective justification of the anticompetitive behaviour. According to the Commission Guidance and recent case law, the efficiency defence is subject to four conditions : (1) The anticompetitive activities of the firm lead to efficiencies (such as technical advancements or lower production or distribution costs) (2)which outweigh any negative impacts on competition or consumer welfare. (3)The conduct is necessary and indispensable to achieve those efficiencies and(4)by eradicating all or most existing sources of real or potential competitors, the action does not remove effective competition.

In the analysis aimed at identifying the abuse of dominance is of course firstly necessary to define whether or not a firm actually covers a dominant position.

1.1 Market power and dominance

To face this first issue of determining the concept of market power is surely useful to have a brief economic explanation about how a perfectly competitive market, the highest possible expression of competition in economical terms, works. It must be noticed that the main purpose of the antitrust intervention is the protection of welfare, and a perfectly competitive market, by maximizing the production, makes the deathweight loss equal to zero, avoiding any waste of well-being .With a huge simplification it can be stated that a market is said to be perfectly competitive when all firms act as price-takers ,i.e. when the firms acting in the market can sell as such as they like at the going price but nothing at a higher price. The maximization of the profit in this type of market is reached when the suppliers produce at the point where the demand meets the supply curve, that is when the price is equal to the marginal cost, the additional cost incurred for the production of an additional unit of output. So,in perfectly competitive markets, market participants have no market power. In the real world however perfect competition doesn't exist, and each firm has a certain degree of "differentiation" due to several factors as where the firms act as price-makers and so are able to affect the price to a certain degree and by consequence a certain amount of market power. This is called imperfect competition. In monopoly, duopoly, oligopoly and all other types of imperfect competition models the maximization of profit always leads to a shift in surplus from consumers to producers, and to the creation of deadweight loss, which decreases total welfare.

Keeping this in mind we can lay the foundation to get the definition of market power.

1.1.1 relevant market

The first step to understand whether or not a firm has a certain extent of market power is the identification of the market in which the firm and its competitors act, the so-called Relevant Market. It is defined as the set of products and geographical areas that exercise some competitive constraints on each other and it's divided into two main areas: the product market and the geographical market.

Concerning the product market analysis, the main insight regards the substitutability, which can born from the demand side as well as from the supply side. In the demand substitutability case the competitive pressure is exerted by firms that sell products regarded as interchangeable or substitutable by customers, and as the price of a firm's goods or services increases, more and more customers will decide to purchase *substitute goods or services.* By the supply side instead the competitive pressure is given by firms that produce different products, but would switch production to compete if prices increase above the competitive level, and as the price of certain goods or services increases, the possibility of obtaining high profits could induce firms supplying different products to enter the market in a relatively short timeframe. The other aspect of this analysis is represented, as stated above, by the geographical distinction among markets, where factors as technical and regulatory barriers, transport costs, language barriers and even consumer preferences are involved in assessing the relevant geographic area in which the market operates.Also in this case the substitutability represents a crucial competitive pressure, since as the price of a firm's goods or services in a particular area increases, customers may decide to turn to suppliers in other geographic areas.

A useful tool of analysis for the identification of the relevant market is given by the SSNIP (Small but Significant and Non-transitory Increase in Prices) test, used to guide the analysis of market definition in both product and geographic dimensions. The relevant market is so identified as the smallest market within which an hypothetical monopolist could impose a small but significant non-transitory increase in price. The test asks whether this hypothetical monopolist could sustain a let's say 5% price increase for at least one year, on the assumption that the prices of all other competitor products are held constant. If a sufficient number of consumers is likely to switch to other products so as to make the price increase unprofitable, the firm lacks the power to raise prices. The relevant market therefore needs to be expanded and the process is repeated until the monopolist could profitably impose a 5% price increase.The range of products and the geographic area so defined constitute the relevant market.

Even if the SSNIP test presents several issues, among the others the difficulty to state the so said " small but significant" increase in price, since a 5 or 10 percent change in price may have huge and different consequences on consumers' perception and choices, and the "cellophane fallacy" problem (basically if firms with market power are already maximizing their profits, a price increase would by definition be unprofitable) it anyway remains an primary and concrete instrument for the detection of the relevant market, and a valuable starting point in the analysis of dominance.

1.1.2 market power

From an economical standpoint the concept of market power can be summarized as the ability of a firm to raise its prices at a level above its marginal cost. It‘s interesting to notice that exists a strict link between the legal notion of dominance and the economic concept market power: in fact, juridically, a dominant position is defined as the power to raise prices or to otherwise significantly influence the parameters of competition.

In economic terms, the most efficient theoretical tool to express the market power is represented by the ***Lerner Index:*** $L=(P-MC)/P$ a number between 0 and 1 that measures the market power of a firm by analyzing the difference between its price and its marginal cost. In perfect competition, since the equilibrium in the market is reached at the point where the price equalizes the marginal cost, the difference P-MC will be equal to zero, and the firm has no market power. the more the difference between the price and the cost increases the more the firm will experience a high degree of market power. Even if it can seem a good measure of market power however, some issues arise from the difficulty to determine MC at any point in time.

Given the limited applicability of MC concept, antitrust economics has focused on the individual firm's demand **elasticity** to determine market power. Elasticity can be described as the measure of the response of the firm's output(change in demand) to a change in price, i.e. relationship between the percentage change in quantity and the percentage change in price**:** $\boldsymbol{\varepsilon = \delta Q/Q \div \delta P/P}$**.** If this relation leads to a number greater than 1 the demand is said to be elastic, and so a change in price will lead to an even greater change in quantity, if instead it is lower than 1 the demand is said to be inelastic and a change in price will lead to a lower change in quantity. Of course, the more the demand is inelastic the more the firm will experience high degree of market power.

In addiction to <u>direct methods</u>(lerner index, elasticity), which in the pratical application could result tricky in assessing effectively the correct measure of market power, competition authorities usually also resort to <u>indirect methods</u>. The standard approach focuses on the firm's market share on a relevant market; high market share often means an high degree of market power. It is not supposed to evaluate the magnitude of market power , but only its presence and the way it moves. Market share is only one of the variables that determine market power, and in order to get a complete analysis other variables must be taken into account, including the relative position of competitors, the pressure exercised by potential entrants and the countervailing power of buyers.

1.1.3 the assessment of dominance

The notion of dominant position finds its roots in the European Commission Judgment of 14 February 1978 when the court stated that (*art 82 EC*):

- "*dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*

(United Brands Company and UniteBrands Continentaal BV v Commission of the European Communities,1978)

The definition of dominance contains two elements: (1) the ability to prevent competition and (2) the ability to behave independently. However, it does not explain how these elements are related one with the other. They both have to be proven, or is one related to the other? The rationale behind the definition of dominance suggests that the possibility to act independently on the market is what effectively makes a firm able to hold a dominant position. This makes sense since the ability to behave independently results in the ability to prevent competition. If an undertaking can behave independently it can logically prevent competition through its behaviour and influence the market in its favour.

In order to assess the dominance of a firm the Commission Guidance identifies three main categories of relevant factors to be analyzed in the competitive structure of the market: (1)the market position of the dominant firm and its competitors , (2)the possibility of expansion and entry of other operators, (3)the bargaining power of buyers. Each of the above steps is key to establishing liability under the article 102 TFEU.

market position of dominant firm and competitors: the first step is a preliminar transition aimed at identifying the competitive environment in which the firm operates, taking into account the percentage share of the market that the undertaking holds. The burden of proof relies on the authority, so there is the obligation to bring sufficient evidences of the dominant position. A conclusion that dominance exists should not be reached based on market shares alone but additional factors also should be considered.The rationale behind the market share analysis relies on the fact that a very high market share suggests that customers may have few alternatives from which to choose in the event that the firm increases price, and that competitors may be unable to effectively respond to the dominant firm behaviour. Viceversa, the presence of a low market share is a good indicator of the fact that any decrease in output or increase in price by the firm are likely to be constrained by other firms. In most jurisdictions, a high market share is one of several elements that must exist before dominance is found. In some jurisdictions, market share thresholds can be used as a basis for establishing a presumption of dominance or a safe harbor(protection from liability if certain conditions are met). Some of the thresholds for the assessment of dominance are:(I) A firm competing as a monopolist holds by definition a position of dominance.(II) If the market share held by the firm is extremely high (e.g. >70%) there are evidences of dominant position. (III)Above 50% market share the firm is likely to be in a dominant position (normally dominant firms hold a percentage of the market higher than 40%). (IV) A low market share (e.g. below 25%)could place a firm within a “safe harbor,” where the firm is presumed not to be dominant.

Expansion and entry of other firms : in evaluating the existence of dominance, antitrust authorities should also consider the likelihood that expansion by existing competitors or entry by potential competitors could be able to overcome the possible exercise of market power. Possible future competitive constraints should be taken into account, and in order to exert a significant competitive constraint, the expansion or entry of other operators must be (i) likely (ii) timely (iii) sufficient. The relevant question here is whether entry or expansion will be able to pose a credible competitive constraint on the incumbent: to determine whether a firm's market power is durable the Authority generally examines various barriers that affect whether entry or expansion is timely, likely, and sufficient to preclude the exercise of market power. For instance if barriers would substantially delay entry or expansion, the impact may not be sufficiently timely to affect the conduct of the firm and obviously entry is likely to occur only if profitable,but the mere presence of some barriers does not mean that they are sufficient to prevent entry and the analysis must comprehensively assess the likelihood of expansion or entry taking in account the cumulative impact of all barriers in the market. Barriers to entry or expansion can be divided into three categories: structural, strategic, and regulatory. The first type ,structural barriers, is mainly related with the market characteristics: they result both from supply factors and demand factors, such as **sunk costs**(may result as a barrier because they increase the risk that an investment in entry will not be profitable, and include not only costs associated with building a manufacturing facility or purchasing equipment, but also costs associated with research and development, consumer research and marketing), **economies of scale and scope** (sometimes can represent a barrier to entry because they make operation at small market share unattractive) and **firm's reputation** (it can be difficult and expensive to compete with a well known and established brand**)**.Strategic barriers instead are created by the conduct of incumbent firms through behaviours such as investment in excess capacity or supply and distribution contracts. Eventually, regulatory barriers rise from rights under the protection of the law, such as intellectual property rights, and from regulations that could favor incumbents or even prohibit entry or expansion. Government regulation often pursues public interest objectives,which may require limitations on market competition in order to achieve this goals. In these circumstances, regulation may have a significative impact in preventing or substantially affecting competition.

Bargaining power of buyers: the capability of a firm in creating dominance and making it last may be affected not only by the number and strength of its competitors, but can also be influenced by the structure and characteristics of the opposite side of the market, the buyers and their countervailing power. In some cases indeed, customers' buying power can counterbalance the market power of the supplier, and negatively affect their dominance.

The conclusion that no dominance exists based exclusively on countervailing power of buyers is likely to be correct only if the buyer has power strong enough to defeat an exercise of market power by the dominant firm.

In assessing the existence and degree of countervailing buyer power there are several factors that must be considered: first of all, **threat from customers to effectively resort to alternative sources**

of supply. Such sources may be actual or potential competitors of the supplier, but in some cases, the customer may even encourage and assist market entry by new competitors. Of course a prerequisite for successfully exercising buyer power is that the buyer is well informed about alternative supply. The credibility of a threat to use an alternative source of supply is closely connected to **the switching cost** the buyer has to face. High switching cost may make it unprofitable for the buyer to change its supplier and, therefore, decrease the threat to resort to alternative suppliers. Other decisive aspects of this analysis can be the **buyer's significance to the seller** (if the buyer accounts for a significant share of the seller's income then the buyer's refusal to purchase may affect the dominance of the seller),**the expertise and special know-how of the buyer** with regard to the supplied product and comprehensive knowledge about the market concerned, and also the **buyer's habits, procedures and culture.**

1.1.4 collective dominance

Collective dominance is defined as the dominant position jointly held by two or more firms. In order to assess the existence of a collective dominance two elements must be present: first, the undertakes have to be capable of adopting a common course of action on the market, they must ***behave as a single*** economic entity. The capability of adopting a common line of action depends on the links between the firms, mainly structural links (e.g.commercial relationships), but even the mere ***oligopolistic interdependence*** may lead to a coordination of firms' commercial activities, and of course it is necessary that the firms are willing to reach a common view and a stable coordination system to effectively compete on the market.
The second factor to analyze is the power ***to behave independently*** of competitors, suppliers and, ultimately, consumers.

In order to assess a possible collective dominance, it is necessary to investigate a number of factors such as the number of oligopolistic firms, the existence if structural or contractual links , the product homogeneity, which has a relevant impact in driving the firms' objectives in the same direction.

1.2 Abuse

Once the presence of a dominant position by one or more undertakings has been determined, it is necessary to establish, for the purposes of this analysis, whether the conduct of the firm has been to some extent "abusive",i.e. effective in threatening competition, and has constituted a breach under the article102 TFEU. In fact, the mere holding of a dominant position is not prohibited as such; however, dominant firms, because of their position, have a special responsibility in committing to not reduce or eliminate the degree of competition with their actions.
The Authorities apply a system of **asymmetric regulation** in assessing what types of activities a dominant firm should not undertake: in essence, by holding such position, dominant firms are obliged to refrain from certain practices that may be *prima facie* lawful (such as, for instance, loyalty discounts and rebates), but cease to be lawful if carried by a company with an high degree of market power.

Abuse is in fact defined as a conduct, different from the normal competition based on merit, that prevent or eliminate competition in a market, ultimately affecting the total welfare. It is important to highlight that a counduct can be abusive regardless from the firm's intentions and willingness.

There are two main types of abuse: **exploitative** abuse and **exclusionary** abuse.

1.2.1 Exploitative Abuse

Exploitative abuse consists in imposing unfair purchase or selling prices, or other unfair trading conditions, both directly and indirectly. It is an abusive conduct which exploits customers or suppliers, but it can result quite hard to correctly determine when a price can be considered 'excessive' and 'unfair'. In fact there is not uniformity among world Antitrust authorities in judging whether or not it actually represents an abuse. For instance, in the US Antitrust view it doesn't represent an infringment and it's even encouraged, while in the European Article 102 TFEU and Article 3 of Law No. 287/90 explicitely prohibit the imposition of unfair prices or other terms aimed at reducing competition. The real issue however is that these provisions do not indicate precise criteria to determine when a price is unfair or excessive. European case law provides some general guidelines

to this extent: generally, a price is abusive when it is "excessive in relation to the economic value of the service provided" or "when the profit margin is excessive and the price is unfair".
Already from this definition it is easy to realize that it is not possible to universally measure with certainty factors as the excessiveness of a profit or the economic value of a good or service, but each case is arbitrary judged and leaves much free space for the interpretation of a court.
Because of this there always have been limited application of the prohibition of excessive prices, however, recent cases law and decisions, as the ECJ vs AKKA/LAA[1] have provided other guidances to face this type of problem.

The application of Article 102 TFUE could result even more difficult in case of information and technology-intensive products covered by **IPRs**(Intellectual Property Rights). In fact, if the Authority bases the analysis of an "unfair" price by just or mainly considering the marginal costs as a benchmark, for many high-tech markets which exhibit high fixed costs and negligible marginal costs could end up in an incorrect assessment, since firms may need to charge prices higher than marginal cost to recoup their fixed costs .
To overcome this issue the ECJ recognized special characteristics for products covered by IPRs: the fact that prices of patented products are higher than those of non-patented products does not necessarily imply that an abuse has been committed but must be submitted to further investigation.
However,some doubts remain on the high difficulty in the measurement of what is really to be considered an excessive price to recover and gain on R&D, and to keep in consideration the risks of failure,which of course make prices higher.

In some industries, such as the electronic communication one**, regulatory measures** may be used to limit dominant enterprises' freedom to set their prices. In order to prevent the abuse of market power to the detriment of customers (excessive retail prices) or competitors (excessive wholesale prices for access services),prices are set on the basis of the costs analyzed from regulatory balances and a fair turnover for the investment.

[1] the case discussed in ECJ is a request from the Supreme Court of Latvia for a preliminary ruling about an appeal case brought by AKKA/LAA, a company managing the copyright of the music works in Latvia. AKKA/LAA appeals the decision of the Latvian Competition Authority which concluded that AKKA/LAA had abused its dominant position by applying "excessive prices".

1.2.2 Exclusionary Abuse

On the other side of the coin we find the exclusionary abuses. As previously stated, due to the possible drawbacks and difficulties regarding the prohibition of exploitation of market power, antitrust authorities normally focus on the maintenance of the competitive structure of the market. However ,Article 102 TFEU does not apply only to practices that directly harm consumers, but also those that cause damage to them **indirectly**, by altering the structure of the market and acting in a way that restricts competition.

The Commission Guidance on exclusionary abuses identifies two requirements for the finding of the infringement:

- Foreclosure**:** due to the conduct of the dominant firm the access of competitors to supplies or markets is hampered or eliminated, leading to a significant reduction of market competition.
- Consumer harm: as a result of the conduct, dominant firm likely to be in a position to profitably increase prices or affect other parameters of competition to the detriment of consumers.

The assessment of the harm for the customers resulting from exclusionary abuse is analyzed on the basis of several factors. The most relevants are: the position of the dominant firm in the market, considering the market share,the relationship with the other players and the position of competitors; the market conditions,such as barriers of entry, economies of scale and scope and network effects;the position of suppliers and customers affected by the unlawful conduct and the extent of the conduct(duration, market coverage,etc..). And last, the evidences of an exclusionary deliberate strategy.

Main practices of exclusionary conduct are:
Predatory pricing ; Exclusive dealing ;Loyalty discounts ; Refusal to deal (including the refusal to grant access to an essential facility or IPRs) ;Price squeeze ; Tiying and Bundling.

1.3 Main types of Exclusionary Abuse

As stated in the previous section exclusionary abuses comprise all practices that a dominant undertaking may use to obstruct others, restrict their options, establish entry barriers and therefore remove or weaken the potential competition in an indirect way. In this paragraph we will further analyze the most common types of exclusionary abuses and the difference European laws that regulate this practices.

1.3.1 Predatory Prices

Predatory pricing is a pricing strategy that relies on forcing competitors out of the market by setting prices below costs, so that other suppliers are unable to compete and have no choice but to exit the market. The company engaging in predatory pricing must suffer a loss during the predatory phase, but when the competition becomes thinner it raises prices again and gets a profit. With enough capital to sustain predatory pricing, a company can end up with a monopoly on the market for a long period of time. The anticompetitive strategy is articulated in two phases:1)The establishment of below-cost prices to prevent the entry of new firms, eliminate rivals, or manage their behavior.2) Subsequent increase in prices in order to recover the losses suffered in the first period and obtain monopoly profits to the detriment of consumers. The consequence of this strategy is a exclusion or reduction in rival's competitiveness and a transitory illusory benefit for consumers, with low prices initial phase and a successive higher increase of them by a monopolist.

Actually predatory pricing strategies are very risky and difficult to implement in practice, because the strategy is more costly to the dominant firm than to the victims, with the risk that the competitors may be more resistant than expected, forcing the dominant firm to a sustained loss. Moreover the price increase during the second phase of the strategy to recover losses could attract new entrants, thus pushing the dominant firm into a position of weakness in which it would not be able to counter the newcomers.

The question in analyzing the strategy is the following: *should antitrust prohibit only below-cost prices?*

The most formalized answer to this question is that above-cost prices should not be considered predatory, because if equally efficient rivals can compete, the decrease in the price level, should be considered a legitimate form of merit-based competition.

In order to assess whether or not the Authority is facing a case of predatory pricing a price-cost test is normally considered necessary.The problem however is to find the most appropriate cost parameter. Across jurisdictions and countries in fact, the parameters for the establishment of this unlawful practice are slightly different. For instance in the US case *Brooke Group* (1993)[2],low pricing infringes the Sherman Act (US antitrust law) only if: "*the price is below an appropriate measure of cost, and there is a reasonable prospect of recoupment"*.

In EU instead, the leading case is represented by ECJ v *AKZO* (1991),and the analysis is conducted following two hypotesis: 1)***Prices below AVC***(average variable costs) are presumptively unlawful,because the dominant firm shouldn't have incentives in setting such prices except that of forcing competitors out of the market, in order to subsequentely raise its prices and take advantage of its monopolistic position. 2**) *Prices below ATC***(average total costs) ***but above AVC*** are unlawful if they are part of a plan aimed at eliminating competitors.

1.3.2 Exclusive Dealing

An exclusive deal is an obligation to purchase or sell a certain good or service exclusively or mostly from or to the dominant firm. Exclusive dealing obligations may lead to anticompetitive foreclosure if they prevent the entry or growth of competitors. At the same time however they may have efficiency gains, such as securing distributors' promotional efforts or preventing free-riding on investments in distribution.

According to the Commission Guidance the use of Exclusive Dealing may change the nature of competition, from competition for individual units to competition for the entire demand of each customer. In fact this strategy may prevent access to the market if competitors are not in a position to compete for the entire demand of individual customer.If rivals may compete on equal terms for each customer's entire demand, anticompetitive effects are unlikely,but anyway, the longer the duration of an exclusive deal , the greater becomes the risk of anticompetitive effects.

Another crucial factor in measuring the effect of an exclusive deal is the degree of foreclosure caused by the practice; generally, the higher is the tied market share,the more likely are anticompetitive effects to exist, and it must be taken in account also how important the foreclosed segment of customers/distribution channels are for a firm and for the market as a whole to compete effectively.

[2] US Supreme Court case in which the court stated that plaintiff alleging predatory pricing must show not only changes in market conditions adverse to its interests but that (1) the prices are below an appropriate measure of its rival's costs, and (2) that the competitor had a reasonable prospect of recouping its investment in the alleged scheme.

1.3.3 Loyalty Discount

Above-cost prices, despite their economical nature of “lecit prices” , may be considered anticompetitive if they are structured in such a way that they could result in a detriment for customers in differentiating their supply sources. This effect may occur, in particular, in the case of **discounts or rebates** conditional on reaching a certain purchase threshold. In particular ,loyalty discounts create switching costs for customers because switching to another supplier would entail the loss of the discount on the units already purchased, and/or on those that would in any case be purchased from the dominant firm.The cost suffered so, is the loss of the discount itself.

Loyalty discounts tend to change the nature of competition from competition for individual units to competition for a certain portion of each customer’s demand. There is no exclusionary effects if rivals are able to compete on equal terms for the entire demand of individual customer, however rivals may not be able to sustain this type of competition because of many factors, including the presence **of strong brand loyalty** or **more limited territorial coverage** than competitors.

In order to induce a customer to purchase its products, a competitor should compensate the customer for the discount lost. However,if a significant portion of the demand of the buyer is not contestable, the price of contestable units (i.e., the price the competitor should offer to induce the customer to purchase its products) may be even lower than both the discounted price and the cost of production.

The traditional approach of EU case law was to considered the practice anticompetitive on the basis of two main grounds: on one hand there are the **loyalty-inducing effects,** reducing competitors’ access to customers, and **discriminatory effects,** with different customers that pay different prices for the same product, depending on whether or not they achieve the thresholds. Moreover while quantity discounts may be justified by economies of scale, and thus may be legitimate, discounts based on individualized thresholds, like fidelity and target discounts, do not reflect cost savings.

The traditional approach was widely criticized: the offer of loyalty discounts and rebates was considered exclusionary just in light of its mere tendency to induce loyalty and to make it more difficult for other operators to enter the market or increase their sales, but without a real effect-based analysis.

The Commission has instead introduced an **effects-based approach**. The presence of an exclusionary effect depends on the existence of an assured base of sales ,i.e., a non contestable portion of the customers' demand. A conditional discount scheme may enable the dominant firm to use the 'non contestable' portion of the demand of each customer ,that is, the amount that would be purchased by the customer from the dominant undertaking in any event, as a leverage to decrease the price to be paid for the 'contestable' portion of demand. The Guidance developed a test based on the estimate of the effective price(the normal price minus the discount the customer loses by switching) of the **«relevant range»** (the share of a customer's requirements that can be switched to a competitor).

So the AEC(as efficient competitor) test aims to establish whether, given the financial advantage granted by the dominant undertaking to customers, an equally efficient rival would have to sell its products at loss in competing for those customers.If the effective price is above LRAIC(long run avg. increm. cost) it has to be considered normally lawful , if it is lower than AAC (avg. avoidable cost)the practice is presumptively unlawful, if instead it is between AAC and LRAIC it becomes necessary to analyze other factors to establish the actual effect of the strategy.

1.3.4 Refusal to Deal

Some assets, facilities or inputs are indispensable to provide goods or services to customers. In some sectors, access to certain infrastructures owned by other incumbents has been often considered necessary to provide services to customers. Moreover assets as IPRs, raw materials and intermediate products may also constitute an indispensable input in the production process of firms active in certain markets.

Under the **essential facility doctrine[3] (EFD),** a dominant firm that controls a facility needed to provide products or services to customers in a downstream market may be obliged to grant the access to the facility at non-discriminatory terms. In favor of this obligation we find the fact that refusing to grant access to these facilities may prevent or hinder the entry of other operators, leading to a decrease in consumer choice and an increase in prices. Moreover in some cases, duplicating the facility may be impossible or too costly. However the need to protect the owner's incentive to invest and innovate (reward for past investiments) and the negative impact on competitors' incentive to develop alternative facilities (risk of free-riding) must also be taken in account as factors against the doctrine.

[3] Supreme Court Decision in "U.S.A. v. Terminal Railroad Association" , 1912.

The issue rises from the difficulty to balance between the protection of property rights and contractual freedom, on the one hand, and the need to safeguard competition, on the other.

In the European Antitrust Authorities view, courts have adopted an interventionist attitude: in the Oscar Bronner (ECJ 1998) The ECJ stated that a ***refusal to grant access is abusive only if three conditions are met*** : (1)The resource is indispensable, because there is no alternative available (even though less convenient) and the resource to which access is required is not duplicable for an efficient firm of comparable size.(2) The refusal is capable of eliminating all competition on the market by the company requesting access.(3) There is no objective justification.
The issues raised by the EFD are even more controversial when IPRs are concerned, as the essential function of these rights is to reward creative efforts and investments, by conferring an exclusive right to exploit the IP. The ECJ stated that the refusal may be abusive if four cumulative conditions are met: (1) The resource is essential for operating in a secondary market.(2) The refusal is such as to reserve the secondary market for the IPR holder, by eliminating all competition in this market. (3) The firm requesting the license intends to offer on the market new products or services, which the IPR holder does not offer and for which there is a potential demand from consumers .(4)There is no objective justification.

1.3.5 Price Squeeze

A "price squeeze" or "margin squeeze" may take place when a vertically integrated monopolist sells its upstream input to firms that compete with the monopolist in the production of a downstream product. Instead of refusing to deal, the dominant firm can set the price for the input relatively high and its downstream price relatively low, so that the upstream-downstream price difference turns out to be too small to enable downstream competitors to compete.

Price squeeze may have exclusionary effects if two conditions are met: (1) downstream competitors need access to an input supplied by the dominant firm; (2)the price differential does not enable rivals to compete effectively in the downstream market.
Even if in principle it could appear illogical to punish a dominant firm for having supplied the input under conditions that did not allow rivals to operate profitably, under EU law in the past decisions, the Commission has adopted a flexible approach: in the Commission Guidance price squeeze was

assimilated to a refusal to deal, so following the principles of the EFD, but in in *TeliaSonera (2011)*[4], the ECJ stated that price squeeze may be abusive even in the absence of the EFD.

In the antitrust practice the so called "***equally efficient competitor test***" is the most appropriate tool to assess the presence of abusive practic : the AEC test allows the dominant firm to compete effectively on prices, and avoids the risk of protecting inefficient rivals.

Tying and Bundling

Practices of dominant firms may create anticompetitive effects not only in the dominated market, but also in related or adjacent markets.In fact, a dominant firm may establish a link between its home market and a horizontally related market by offering a product under the condition that another product is also bought from the same supplier.The phenomenon is called tie-in sale and includes two main practices: **tying,** customers that purchase one product (the tying product) are required to also purchase another product (the tied product) from the dominant firm; **Bundling,** two or more products are sold together in a package. Among this practice there is a distinction between pure bundling:(two or more products are sold together for a single price and are offered only in fixed proportions) and mixed bundling (consumers have the choice of buying the products separately or together as a bundle at a lower overall price).

Tying and bundling may lead to many possible efficiency gains for the firm, including scope economies through the joint production or distribution of two or more products; quality assurance and technical development.

Under the European Antitrust view the practice is likely to infringe Article 102 TFEU if the supplier is dominant in the market for the tying product and the practice cannot be objectively justified. An objective justification requires that the dominant firm pursues a legitimate objective (e.g.: protection of safety or public health) and that tying is a reasonable and proportionate means to achieve that objective.

In the case of mixed bundling, customers are free to buy the products concerned separately.Mixed bundling may have foreclosure effects depending on the price level. The main concern is that the

[4] ECJ margin squeeze case in north EU ADSL market.

offer of a bundle including one or more «monopolized» products at a low price may lead to the exclusion of single-product competitors. The Commission Guidance introduced a price-cost test based on the estimate of the incremental price of each product included in the bundle (i.e., the price of the bundle minus the sum of the standalone prices of all other products):following this test if the incremental price of each product is above the LRAIC of that product, equally efficient single-product competitors should be able to compete,if it is below LRAIC, enforcement action is possible.

2. THE ASSESSMENT PROCEDURE OF THE AMAZON'S CONDUCT*:* *AN INTRODUCTION*

In the following paragraphs, the purpose of this dissertation will turn primarily to the analysis of the preliminary investigation activity carried out by the Italian Antitrust Authority(AGCM) against the group of companies, specifically Amazon Europe Core S.à r.l (AEC), Amazon Services Europe S.à r.l. (ASE), Amazon EU S.à r.l. (AEU), Amazon Italia Services S.r.l. (AIS), Amazon Italia Logistica S.r.l. (AIL), under the name of AMAZON. The proceedings were initiated against the e-commerce giant for allegedly infringing Article 102 TFEU by linking the attainment of certain benefits on Amazon.it to the purchase of its logistics service offered to retailers. Specifically, the main systems of operation of the company, the marketplace and the order-related logistics will be introduced, in order to obtain a clear and complete picture of Amazon's organisation, so as to be able, in the following chapters, to introduce the moves made by the Authority in its assessment of the infringement.

Amazon.it has, by its very nature, a dual function: on the one hand, the company itself performs a sales action, positioning itself as a retailer within its own marketplace, and on the other hand, it performs the function of intermediation service provider for the marketplace that it owns. It will therefore be necessary to identify and analyse both segments in order to be able to inquire into the abusive action of Amazon.

2.1 E-commerce

The first step towards understanding how Amazon.it works lies in the identification of what e-commerce is and how it is structured: electronic commerce, or online commerce or e-commerce, is defined as the set of transactions for the sale of goods and services carried out via the Internet. Different types of e-commerce can be identified, the most frequent of which are B2B (business-to-business), which refers to commercial relations between companies, and B2C (business-to-consumer), i.e. online retail commerce, between companies and final consumers: within B2C e-commerce, only two channels are identified that allow the transaction to take place directly between the two groups: the seller's website and e-commerce platforms, called marketplaces.

From the **consumer**'s point of view, ecommerce represents a viable purchasing alternative to traditional commerce for a number of reasons, among them the possibility of buying wherever one is and at any time, comparing many offers and concluding the purchase quickly, benefiting from the previous experience of other consumers and with the possibility of immediate feedback through reviews.

On the other hand, from the **seller**'s point of view, the first factor driving the decision to turn to e-commerce is the opportunity to reach a wide range of customers and serve multiple geographic markets without time constraints. Through e-commerce, a seller can in fact make its offer visible to new consumer groups and markets at incomparably lower costs than those required to set up an equally extensive network of physical outlets.

Over the past few years, e-commerce has experienced substantial growth globally and has thus become a viable alternative to classic commerce. In 2019, the online purchase of goods and services by consumers generated a total worldwide turnover of around EUR 3 trillion (+20% compared to 2018). Thanks also to the particular pandemic situation, it is estimated that this value may have exceeded EUR 3.5 trillion in 2020 and reached EUR 4 trillion in 2021. In Italy, according to the latest available Istat data, the percentage of the population making online purchases has increased (from 53% in 2017 to 56% in 2018). In addition, around 17 million Italian users are 'regular' online shoppers, having bought online at least once a month, with an average per capita spending on online purchases of over EUR 670[5] **.**The turnover generated by e-commerce in Italy also showed steady growth, with turnover in 2019 amounting to EUR 48.5 billion, up 17% compared to 2018[6].

2.2 The Marketplace

In e-commerce, an important role is played by ***marketplaces***, two-sided platforms on which the operator provides consumers and sellers with intermediary services aimed at matching the demand for purchases of the former with the supply of the latter. A marketplace allows consumers to access the supply of goods of different categories from multiple sellers and sellers to offer their products to a very wide audience.

A marketplace mainly presents indirect network effects (as the number of consumers increases, the convenience of the platform for sellers increases and vice versa), but also direct effects (more consumer reviews benefit other users, just as more sellers increase interest and usage of the platform), and given the importance of these effects, the number of consumers and sellers thus becomes the key variable for the success of the platform.

[5] ISTAT datas, available in bibliography.
[6] Inside Marketing analysis, available in bibliography.

Despite the fact that both groups benefit from the use of the platform, the demand and needs of sellers and consumers differ and are not aligned. The motivations for the two groups to choose a marketplace as a platform on which to make sales and purchases are different: from the consumer's point of view, a marketplace represents more competition and thus lower prices, a wide range of products, speed and simplicity of search and often, a guarantee of the reliability of the economic transaction that is not always recognised in the sellers' proprietary sites. Compared to retailer websites without an established brand name, marketplaces base their success on a set of factors that increase consumer confidence in the security of the transaction: in fact, platforms provide greater guarantees of the reliability of the seller, thanks to checks and controls carried out by the platform operator, greater security of payments and of the entire product delivery part, as well as better customer care services, with efficient handling of returns and complaints.

The main difference in the use of the marketplace is, however, experienced on the seller's side, which, especially if medium-sized or small, absolutely benefits from the network effects of the platform. Specifically, sellers active on marketplaces benefit from three main advantages compared to those on their own: firstly, the marketplace guarantees the seller *high visibility*, making up for the lack of consumer awareness and increasing the degree of market penetration. Just looking at data, the monthly number of visits to major e-commerce platforms is significantly higher than the number of visits to any website, even for popular brands such as Apple and Samsung. In 2020, on average, more than 3.6 billion people visited Amazon.com and about 1 billion eBay each month. The top proprietary site in this ranking is Samsung's, with an average number of monthly visits of 600 million.

The second peculiarity related to marketplaces from the retailer's point of view is related to the possibility of *lower start-up and running costs* of the online business compared to using one's own website: marketplaces allow for less investment and expertise, especially for sellers with small size and limited financial capacity. In addition, selling on marketplaces enables retailers to simplify interactions with consumers and reduce market intelligence costs[7], and a set of additional services including optimised product sheets to provide the seller with better visibility and consumer ratings, secure and reliable payment services, customer care, order dispatch and returns management.

Ultimately, consumer trust in marketplaces translates into the ability to attract consumers, but more importantly to convince them to buy and return later. This represents an increase in the seller's own *reputation*, since the reliability of the retailer is associated with the reliability of the marketplace,

[7] Market intelligence can be defined as the collection of useful datas and knowledge that a company derives from the market it operates in order to gain a competitive advantage.

which, benefiting from the network effects described above, achieves a higher level of security in the eyes of the consumer than proprietary sites. In addition, the use of the marketplace leads to a strengthening of the retailer's competitive position in the marketplace due to the increased sales volume that sellers are able to channel to the marketplace.

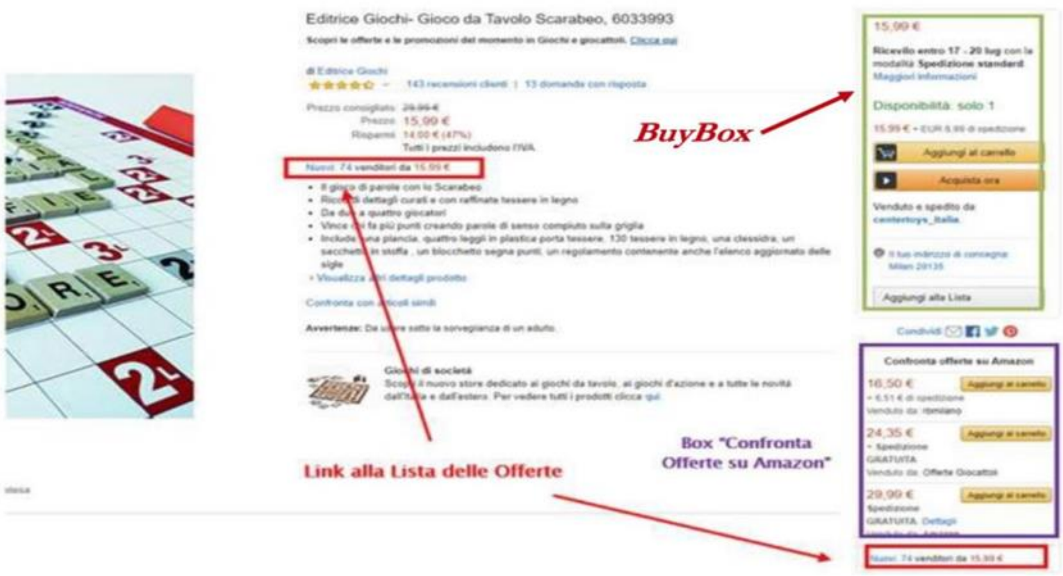
2.2.1 *A brief classification of marketplaces*

Although a marketplace can be defined as a generic "virtual place" where transactions between groups of sellers and buyers with the characteristics listed above are carried out, there is a substantial classification and differentiation between types of marketplaces, based on organisation, types of products traded and contact between buyer and seller. It is worth noting that, although there are different types of marketplace commerce conditioned by the agents employed in such commerce, depending on whether it follows a B2B model (e.g. alibaba.com, which despite having a double-sided end-consumer-oriented side is mainly related to B2C or C2C wholesale trade), the characteristics that will be highlighted in this analysis mainly concern B2C commerce, which Amazon deals with in its own marketplace and which is relevant for the purpose of the analysis. The first distinction is based on the relationship between the sales channels and the marketplace operator and distinguishes between *pure vs. hybrid* marketplaces: hybrid marketplaces are those in which the platform operator is active in the direct sale to end consumers of products purchased from suppliers as well as hosting the offers of third-party retailers, whereas in pure marketplaces it "limits" itself to operating the platform for the offer to third-party sellers of intermediary services. As an example among the leading marketplaces, eBay adopts a pure model, whereas Amazon is a hybrid platform, also operating as a retailer in competition with third-party sellers. The second distinction is made on the basis of the number of product categories offered and distinguishes between *horizontal* marketplaces, which offer products of all kinds (although the distinction between the various categories still remains clear) and *vertical* marketplaces, where the products marketed belong to specific categories. Consequently, the major distinction lies in the different target groups of users that the two marketplaces have: whereas a vertical platform mainly satisfies the needs of consumers looking for a specific product and a targeted purchase, a horizontal marketplace is aimed at a more generalist audience, interested in the breadth of the offer and the opportunities for savings. Consequently, these differences influence the choices of more selective sellers who are willing to enhance their offerings on specialised sites. The last relevant distinction relating to the various types of marketplaces, as well as useful for the purpose of this analysis, is that relating to the geographical breadth of the marketplace, where a distinction is made between *national and international* marketplaces. Platforms operating on an international scale tend to have a distinct, country-specific web domain (a model applied by Amazon itself) which, depending on the country in which the site is visited, operates with different domains and different languages. Substantially national platforms, on the other hand, are active in one (or a few) markets and are available in the local language, without translation into other languages (or with a simple automatic translation) . The possibility of reaching consumers in a specific country thus depends largely on the availability of the platform in the local language, and consequently makes the internationalisation of such companies limited to the use of it.

2.3 Amazon.it

As mentioned above, the main activities of the Amazon group are (i) e-commerce, in which it is active both in direct sales to consumers (Amazon Retail) and in offering intermediation services to third-party sellers. In addition to these, Amazon, in its role as operator of the marketplace, in addition to the 'basic' service of selling on the platform (called Selling on Amazon), offers to retailers a wide range of complementary services, including: the integrated order logistics service (**Fulfillment by Amazon - FBA**), the targeted and sponsored advertising service (Sponsored Products, Sponsored Brands, Sponsored Display, Stores),and the payment service (Amazon Pay). Amazon also offers consumers numerous services related to the purchase of a product online: personalised search, fast delivery (same-day in some cities), complaint and return management, a digital payment system, as well as the **"Prime"** loyalty programme. On the whole, the business model adopted by Amazon is that of a closed and complete ecosystem, from the perspective of both sellers and consumers, characterised by the offer of services covering every phase of the online selling and buying experience.

From the buyer's side, the *"shopping journey"* on Amazon is articulated in several stages, all integrated with each other on the Amazon.it website, which can be briefly summarised as follows: from the Amazon.it homepage, the consumer can search for a product using the search bar and limit the scope of the search by using various navigation filters, based on the category of the desired product, shipping methods and so on; the results page displays the various products judged by Amazon to be relevant to the consumer's search and consistent with the user's profile, and Amazon also assigns labels to certain products to guide customers in their choice: These include "Amazon's Choice" (the product which is the most likely to satisfy the customer), and "Bestseller", (the most successful product of the category). Once the consumer selects the desired product, one arrives at the so-called "detail page" which is structured as shown in the image below:



From that page, one can proceed directly to purchase by selecting the box on the right of the page, called ***BuyBox***. It is the offer that Amazon deems the most suitable to satisfy the consumer's search (based on an algorithm that will be explained later) so that the consumer proceeds to purchase the product without viewing offers from other retailers and without making any comparison between the available offers in terms of price, delivery time and cost.As the default choice for shoppers, the Amazon Buy Box accounts for almost 85 percent of total sales on Amazon,meaning less than 20 percent of sales go to sellers outside the Buy Box.

Once the consumer proceeds to complete the order, she enters in the shipping phase: with regard to the shipping phase of the item, both sold by Amazon Retail or by retailers managed by Amazon via FBA, there are different shipping options for orders, distinguished according to delivery time and cost: conversely,for items whose delivery is wholly managed by retailers, shipping costs are set by the retailers themselves, who may decide to bear the relevant costs and offer free shipping. A key role in this phase especially is played by the **Prime programme**: Prime is Amazon's consumer loyalty programme and plays a central role in the functioning of the marketplace. Launched on Amazon.it in 2011, it is a paid service that, at a cost of EUR 36 per year, among other things, allows subscribers to take advantage of the Premium delivery service, significantly faster than the standard one, at no additional cost, on products with a Prime badge (obtained with FBA). Depending on location, delivery can take place the same day as the order or within a maximum of two days. On Amazon.it each user may or may not be a Prime subscriber. Prime subscribers can purchase products with the Prime badge without paying shipping costs. The Prime product can be sold by Amazon Retail (all products sold directly by Amazon are included in the Prime programme) or by a retailer. It is estimated that the number of users subscribing to the prime programme has grown exponentially since 2011 to reach 80% of the total annual value of transactions on amazon.it in 2019 and that the average annual expenditure of a prime user is around $600 compared to $150 for non-prime users[8] .

Another significant element in the operation of Amazon.it is the so-called **"special deals":** throughout the year, Amazon organises a series of special events to offer consumers deals on various products. The mainstay events are Prime Day, Back-To-School and Black Friday/Cyber Monday. They take place once a year. During pillar events, as well as throughout the year, retailers have at their disposal different types of offers to promote their products, which are characterised by their short duration and are able to arouse high interest among consumers. Due to the attractiveness of these events, two clear trends emerge: firstly, irrespective of the initiative, the number of visitors and shoppers increases significantly compared to the monthly average during non-event days. Secondly, the average conversion rate, i.e. the percentage of users who actually buy versus those who only visit, is up to five times higher than the average for the month. Finally, calculating the daily average of active consumers and unique visitors for the months of interest shows that (i) promotional events attract on average 30% more visitors to Amazon.it than a 'normal' day of the same month, with peaks of even 70% during Black Fridays, and (ii) the number of active consumers during promotions is up to 5 times the daily average for the month.

2.3.1 *Amazon Logistics*

Given the dual nature of Amazon's role on Amazon.it (marketplace operator and retailer), it is important to introduce the operation of the logistics activity both for goods sold directly by the company and for those sold by third party retailers. In addition, although the relevance of this programme will be set out later in this analysis, it is worth emphasising the existence of a further loigistics service proposed by amazon under the name of **SFP(seller fulfilled prime),** which played an important role in the company's defences during the investigation proposed by the AGCM in finding the infringement.

Proceeding in order, for the storage and distribution of products sold directly by the Company under Amazon Retail and those of third party sellers using FBA (next paragraph), Amazon has developed its own logistics network, the so called Amazon Fulfillment Network(AFN).In summary, the structure of the logistics service can be summarised as follows: The AFN consists of:(i)fulfilment centres, the

[8] AGCM 27623, preliminary doc. 352

main warehouse logistics nodes,(ii) sorting centres, and regional depots (delivery stations), where parcels are sorted according to destination and picked up by local carriers for delivery to end consumers. For delivery, Amazon uses two modes: in urban and densely populated areas, the Company uses local couriers, called Delivery Service Providers. The DSPs pick up the parcel at the Company's sorting centres and delivery stations located near large cities and perform the “last mile” service. For deliveries in rural areas, and far from its own sorting centres, Amazon buys delivery services from national carriers (including GLS, Post Office, BRT), which pick up parcels from the Company's distribution centres and then use its own distribution network to deliver orders to end consumers.

A retailer active on Amazon.it can manage the logistics activities of its products for sale on the platform in two ways: by keeping the management in-house (or by outsourcing it to a third-party logistics operator other than Amazon), a mode that Amazon calls Merchant Fulfillment Network - MFN, or by using Amazon's logistics network (AFN), by purchasing Amazon's Logistics Service (FBA).

The FBA integrated logistics service, is by far the most important of the complementary services to selling on Amazon: it generates a significant percentage of revenues from the brokerage business, in 2019 almost EUR 1,000 million, and among other things allows third-party retailers to qualify their products for the Prime programme and to have exclusive access to a series of benefits related to selling on Amazon.it. In fact, FBA allows third-party sellers on Amazon.it the access to the AFN to manage products for sale on the marketplace and the fulfilment of related orders. Sellers adhering to FBA must ship products to an Amazon warehouse indicated by the Company, and once the purchase order is received, Amazon performs all the logistics on behalf of the retailer. FBA is, therefore, an integrated logistics service that includes the retailer's warehousing and inventory management activities at Amazon's distribution centres, the fulfilment of orders received on Amazon.it, and shipping, transport and delivery, as well as the management of returns and customer service, taking care of all the logistics activities necessary for the accomplishment of an order. FBA thus presents itself as a complete “one-stop shop” [9] integrated service, competing with the logistics services offered by other operators but also intercepting the demand of those who manage logistics “at home” and only need the shipping phase. The major distinction of FBA from its competitors occurs because, due to the integration between marketplace and logistics, and the high volume of sales realised by retailers on the platform, Amazon can offer a single-channel logistics service dedicated to the orders realised

[9] It is a firm that offers a broad set of different products all “under the same roof”.

on the Amazon platform, opposed to other operators who have to provide a more complex multi-channel management service, which includes orders from all sales channels on which the retailer is active. Moreover, the FBA service is in no way replicable by other logistics operators since its peculiarity is precisely that it is tied to Amazon.it, whose sales volume is not matched by any other marketplace. The price of the FBA service is based on a series of variable pay-per-use fees divided into, storage fee (varies depending on warehouse space required), shipping fee (depends on size and weight of product and destination), and return processing fee. Over the last few years, there has been a significant increase in the cost of these fees, with the shipping fee alone increasing by an average of 16% in 2018 and 7% in 2019 for standard size parcels and by over 24% in 2019 for 'oversized' parcels. Lastly, for retailers participating in the FBA service who want to entrust Amazon with the logistical management of orders from other channels (other marketplaces, their own site, etc.) Amazon provides another service under the name Multi channel fulfilment(MCF), although during the preliminary activity it emerged from Amazon itself that this type of service is impractical and costly.

The last type of logistics management possible on Amazon.it is the already mentioned SFP programme, which allows retailers to organise the logistics of products without using FBA and to associate the Prime label with them. Unlike FBA, the SFP product is stored on the facilities of the seller or of an external logistics operator (who take care of the packaging and labelling),where the Prime Carrier goes, collects the package and delivers it to the final consumer through its own distribution network. On the basis of the Company's statement to the Authority, SFP is based on three key elements, which are described in the following lines: 1) the qualification and monitoring of sellers wishing to use this mode of handling their orders: in order to be admitted to SFP, a retailer must qualify on the basis of parameters reflecting the criteria used by Amazon to define Prime standards, relating to seller reliability and punctuality of delivery. These parameters are initially monitored by Amazon, which allows the retailer to sell only a few products and then, as the programme progresses, monitoring switches to a weekly basis. 2) the qualification and monitoring of carriers that agree to provide delivery services respecting the standards set by Amazon: carriers wishing to operate under SFP must be able to meet the same standards that Amazon meets through its FBA logistics service and that it imposes on couriers for AFN deliveries. It will then be analysed how in reality Amazon has based its courier selection process on the negotiation of commercial conditions, first and foremost of a tariff type, so as to make the carrier qualification process a negotiation and contractualisation of essential aspects of the relationship between carrier and seller . With regard to the Italian market, as represented by Amazon [10] the standards required to obtain Prime Carrier qualification correspond to the ability, among other things, to guarantee delivery within 24/48 hours in 95% of postcodes and to respect the delivery date chosen by the consumer for 95% of orders. 3)The signing of a contract for the delivery of the products included in SFP between seller and carrier.

2.3.2 *Amazon's Strategy*

The company, as highlighted by the Authority's proceeding, has defined a series of marketplace rules that allow the offers retailers managed with FBA to benefit from a series of advantages foreclosed to the rest of the retailers. These benefits, which will be analysed in the following pages, can be seen as a single product which can be interpreted as "greater visibility" of the offer of FBA sellers on Amazon.it, from which derives a certain improvement in their overall commercial performance and, in particular, an increase in sales on Amazon.it. In fact, it is in this context that the strategy imputed to Amazon has been developed, having subordinated access to the "visibility product" to retailers' subscription to FBA; this conduct is characterised, therefore, by a clear purpose of self-preferencing of its own logistics service, since, as will be explained below, there is no functional link that justifies the exclusive association of the above-mentioned advantages with the use of FBA.

Specifically, 3 main advantages have been highlighted that tie success on the platform to subscription to the FBA service in an almost binding manner:

a)***Non-application of evaluation metrics***: FBA offers are not subject to evaluation and control by Amazon through the set of indicators designed to monitor the level of performance of retailers' offers on the marketplace; therefore, the performance of a seller that entrusts FBA with the management of all its offers on Amazon.it is not subject to any evaluation. Amazon monitors the activity of sellers on the basis of a complex set of metrics developed by the Company (not relevant for the purposes of this analysis from a technical standpoint) that measure three aspects relating to orders placed by sellers on the marketplace such as the percentage of defective orders, the percentage of cancellations made by the seller prior to delivery, and the percentage of delayed shipments. At all times, retailers must be able to show values below a critical threshold set by Amazon for each of these metrics, under penalty of a formal warning from the company and in the event of a recurrence, suspension of the retailer's sales rights until the retailer has devised a plan to remedy the causes of the performance

[10] AGCM 27623 docs. 345, 354 .

defect. Amazon argued to the Authority that it implemented these metrics because it could not directly control the management of each retailer's business and needed measures to maintain high standards. In contrast, when orders are managed through FBA, the Company claims to have full visibility of performance, to be able to check for problems, and to be able to intervene when necessary. Evaluation metrics, in addition to the function described above, play a fundamental role in obtaining certain advantages in the marketplace that will be explained further on.

b) ***Obtaining a Prime Badge***: as stated, Prime is Amazon's consumer loyalty programme. All Amazon Retail products are automatically included in the Prime programme. As for products of retailers, Amazon has tied the possibility of obtaining the Prime badge, at least until August 2019, the date of the introduction of the SFP programme,to the subscription to the FBA programme. It is well to point out that in 2019 about 90% of the total value of sales of products handled through FBA came from purchases by Prime users, and this amount corresponds to about 50% of all transactions on Amazon carried out by retailers[11] . This link between FBA and the Prime badge is highlighted in several documents by the company itself, first and foremost in its annual letters to shareholders: already in the 2013 letter it was stated that *"[FBA] has been a game changer for our seller customers because their items become eligible for Prime benefits, which drives their sales, while at the same time benefitting consumers with additional Prime selection*". In 2014, it was emphasised that thanks to FBA, vendors could *"easily scaling their businesses to reach millions of customers. And not just any customers - Prime members""* In 2015, the winning link between FBA and Prime emerges even more clearly: "*FBA is so important because it is the glue that inextricably links Marketplace and Prime. Thanks to FBA, Marketplace and Prime are no longer two things[..]. But even more important, when a seller joins FBA, their items can become Prime. Notice also what happens from a Prime member's point of view. Every time a seller joins FBA, Prime members get more Prime eligible selection. The value of membership goes up*".

In conclusion, the possibility of gaining access to Prime consumers, the most active and profitable segment at Amazon, makes the choice of FBA subscription almost compulsory for retailers.

c)***Assignment of the BuyBox***: as mentioned, the BuyBox is a box at the top right of the product detail page that contains a seller's offer for the product requested by the consumer that can be purchased directly by the consumer without displaying the other offers available for that product. The purpose of the buy box, theoretically, is to simplify the buying process for customers by highlighting the offer that is most likely to be chosen considering price, shipping speed and other features. The assignment

[11] Data processed by the AGCM in the preliminary activity 27623.

of such a buy box is determined by the FMA (Featured Merchant Algorithm), which operates in two phases, first examining the offers "suitable" for the assignment of the buybox, through a set of seven filters [12] that eliminate offers that do not meet the customer's characteristics, and then, in the second phase, estimates, for each of the offers selected in the first phase, the probability that a customer will choose that particular offer on the basis of five characteristics (X1-X5);

$$\mathbf{FMAi,r = \beta1 \cdot X1i,r + \beta2 \cdot X2i,r + \beta3 \cdot X3i,r + \beta4 \cdot X4i,r + \beta5 \cdot X5i,r}$$

To the five characteristics of the offer listed above, FMA associates a "weight" (β) determined through econometric and machine learning methods. The algorithm calculates the FMA Score as the sum of the product between the individual weights (β) and the values assumed by the five characteristics (Xi,r) where X indicates the characteristic, i the offer and r the retailer, and finally, the scores obtained by the eligible offers determine the FMA ranking: the offer with the highest score will be the offer in the buybox.

Of these 5 characteristics, 2 in particular are relevant for the purposes of this analysis as they are tied to FBA underwriting, (and this is where the lack of the application of the vavaluation metrics for Prime sellers comes into relevance): Third-party seller performance evaluation(X2) and Prime suitability of the offer(X5). "X2" depends on the seller's delivery performance based on metrics such as negative reviews or late deliveries. Since the evaluation metrics do not apply to FBA retailers, this indicator takes a maximum value of 1 by default for their offers, so in the FMA calculation the overall value for an FBA offer of this characteristic will always be greater than (or, at most, equal to) the value of a non-FBA offer. "X5" is, on the other hand, a binary variable which takes on a value of 1 if the offer is included in the Prime programme and 0 otherwise. Therefore for FBA-managed bids, the total value β5X5 will always be positive (since β>0) as opposed to non-FBA bids for which it will always be equal to 0. This element of the FMA score drastically reduces the probability of non FBA-managed bids being selected as a Featured Bid.

Based on this, entrusting Amazon with the logistics of orders received on Amazon.it affects the process of awarding the BuyBox, giving a Prime offer a two to three times higher probability of being awarded the BuyBox than a non-Prime offer.

In addition to the above-mentioned advantages, subscribing to FBA makes the retailer eligible for the special deals described above, which represent an extremely relevant opportunity for retailers due to the special consumer flow they drive to the platform.

[12] AGCM doc 182,D 35 preliminary activity 27623.

In conclusion, having now outlined the basics of Amazon's strategy, we have laid the foundations to be able to understand where and to what extent the company's conduct has been highlighted as abusive by the Authority, thus being able to analyse in the next chapters the result of such conduct having a clear and complete picture of what Amazon is and how it works, thus being able to proceed to the identification of the infringement.

3. THE ASSESSMENT PROCEDURE OF THE AMAZON'S CONDUCT: *RELEVANT MARKET AND DOMINANT POSITION*

After having highlighted in the previous sections the foundations necessary to understand the functioning of Amazon, the purpose of the following paragraphs will be to adress the focus of this analysis toward the evalation carried out by the Authority in the assessment of the abusive conduct; this chapter will be divided into two main parts, following the theoretical line previously set out for the assessment of an abuse of a dominant position, the first one dealing with the estimation of the relevant market in which the company operates and the second one establishing the company's dominant position within them, thus preparing the ground for the subsequent judgement of the abusive conduct. It is interesting to notice how the theoretical procedure for this type of valuation finds a great implication in the practical aspect, allowing, through the collection andthe analysis of large amounts of data, to effectively establish the position and the weight that the company has in the market.

3.1 The Relevant Market

The first step taken by the Authority in establishing Amazon's dominance(as freshly described) was to identify the relevant markets, i.e. the markets in which the company operates both directly and indirectly. The markets that turned out to be relevant for the purpose of the analysis and in which the company's competitive presence was found to be in were mainly two: the market for ***marketplace brokerage services*** and the ***e-commerce logistics services*** market :in the next lines both will be individually analyzed.

3.1.1Market for Marketplace brokerage services

Brokerage services on electronic commerce platforms (marketplaces) correspond to the set of services provided by the owner and operator of the platform for the benefit of retailers wishing to sell their products online, outside of their own website, while willing to retain the ownership of the relationship with the end customer. Marketplaces, being by nature two-sided transaction platforms, are going to be analysed,in defining a relevant market, on both sides of the platform following a multi-market approach. Therefore, the competitive conditions on both sides of the platform are analysed separately, while taking into account the interdependence between them due to the 'cross-market' externalities that distinguish two-sided platforms. From the retailer's perspective in fact, marketplaces provide a range of services, as the basic sale service and complementary actions (logistic,dispatch,storage…) which enable sellers to access a "shop window" and to sell online without the need to incur the corresponding "on your own" investments. From this point of view, the marketplace represents an "off-the-shelf" mode of access to e-commerce. Marketplaces act as intermediaries between sellers and customer, facilitating the meeting and conclusion of the transaction, but remaining external to the negotiating relationship between the two parties. The possibility of identifying a relevant market that corresponds to the supply of intermediation services on marketplaces rests on the absence of demand-side substitutability (of retailers) between the various sales channels of their products. It basically means that in order to evaluate the correct relevant market the marketplace must be compared with the "similar services" to understand whether or not there is interaction between them. The analysis in this respect focuses mainly on four different dimensions, which will be evaluated specifically in the following paragraphs. The dimensions in question are non-substitutability with: *physical channels*; *proprietary websites*; between *horizontal marketplaces and vertical marketplaces*; between *marketplaces and price comparison sites*. Of course, it is important to take into account also the Geographical Market, which even if it could seem to not have a relevance(given the online dimension of the market), is strictly linked with the by the use of the web site domain. In this regard, the geographical market has been defined as the Italian one , considering, among the other things, language barriers and the remarkable costs applied to cross-border shipments.

3.1.1.1 Non Substitutability with Physical Channel

The physical channel of selling is not deemed substitutable with online sales and, in the context of e-commerce, with the brokerage services offered by marketplaces. Indeed, the decision to sell online takes on peculiarities that clearly distinguish it from the choice to operate through the physical channel, including reaching more consumers, having no time limits, reducing transaction costs, and providing consumers with information more easily. For retailers, the online sales channel is fundamentally different from the operation of a physical shop (or chain of shops): the two channels enable them to reach a somewhat different customer base, but above all they respond to two different business models. Just by looking at data[13], Amazon itself conducted a consumer survey whose findings show that when faced with a 5% increase in the price of goods sold in all marketplaces, only 20% of consumers would 'divert' their purchases to the physical channel, while 60% of respondents would continue to buy the same product in marketplaces and the remaining 20% would continue to

[13] AGCM Cfr. doc. 447, attachment preliminary activity 27623

buy in marketplaces but a different product. Therefore, it is not possible for the two channels to exert a competitive constraint on each other to some extent because they serve two different portions of the market with different customers.

3.1.1.2 Non Substitutability with Proprietary Websites

A marketplace allows the seller to take advantage of a much broader range of consumers than it could reach individually through its own website: thanks to the platform's notoriety, but also to its function as a place of aggregation of various offers belonging to different product categories, the network effects from which individual retailers, especially small and medium-sized ones, take advantage, make possible the access to audiences of consumers that would otherwise be extremely costly to reach(or even impossible), using individual sites linked to individual companies.

Moreover, customer’s trust depends on the level of security provided by the marketplace, which, in turn, depends on a number of factors as the reliability of payment services, the security of delivery and a prompt and efficient customer care, and the setting up of one's own e-commerce website entails fixed and sunk set-up costs, opposed to the possibility guaranteed by the marketplace to benefit from a set of services through the payment of intermediation commissions only.

The choice of selling through one's own website or using a marketplace corresponds, therefore, to two different business models, which imply a very different cost structure. This different cost structure leads to a much lower level of entrepreneurial risk in the case of using a marketplace. Moreover, for online retailers, especially those of small to medium size and without a well-known brand, the choice to sell via an e-commerce platform also derives from the consumer's preference for the security and reliability of such platforms, which couldn’t be reached by the proprietary website.

3.1.1.3 Horizontal Marketplace vs Vertical Marketplace

Thanks to the large number of product categories present on horizontal marketplaces, these platforms become an environment to which one can turn for multiple and diverse purchases, even on the same shopping occasion. Differently, the specialisation of vertical marketplaces satisfies the needs of the consumer who is looking for a specific product belonging to the relevant category. It follows that the retailer's presence on the two types of platform allows them to reach different demand, thus making them complementary and not alternatives. Two of Amazon's main competing marketplaces ,eBay and ePrice also consider that there is a low degree of substitutability between horizontal and vertical platforms due, above all, to the different business models.

3.1.1.4 Marketplace vs Price Comparison Websites

In this regard, the European Commission expressed itself in the context of the decision on the infringement of Article 102 TFEU in the *Google Search (Shopping) case*[14] of 27 June 2017. On that occasion, the Commission noted that comparator sites and search engines (such as Google Shopping) belong to a relevant market distinct from that of e-commerce platforms (such as Amazon): in fact, although comparator sites allow consumers to compare online offers of the same good from multiple sellers, such sites lack e-commerce functionality and, as a result, do not offer any of the additional services that complement the offer of marketplaces to consumers and sellers. Also the pricing structure applied by the two types of platforms is different: price comparison websites earn commissions paid by sellers for each user that comes to the e-commerce site through the comparator, regardless of whether the contact results in a purchase or not. By contrast, marketplaces get commissions paid by the retailers calculated as a percentage of the value of transactions that take place on the platform. Comparator sites are therefore not substitutable with brokerage platforms and so do not fall within the relevant market related to the Company.

3.1.2 Market for e-Commerce Logistics Services

Electronic commerce is highly dependent on the provision of a number of logistical services complementary to the sale, first and foremost the delivery service of the product purchased online, which assumes a crucial importance in the shopping experience and which of course represents a benchmark for the creation of customer value. In addition to the significant change in the shipping and delivery phase, e-commerce has imposed the adaptation of a series of logistics functions upstream and downstream of the delivery. In fact, warehouse management for goods adressed to e-commerce requires an extremely greater degree of automation than that necessary for the storage and handling of goods destined for traditional commerce, thus necessitating the formation of a much more integrated and fluid service than in classic commerce. Ancillary services, such as customer care , play a fundamental role in the completion of logistics services dedicated to e-commerce, whereas they are almost completely absent in business-to-business relationships and constitute fundamental differences in the associated logistics activities , compared to the functions required to support commerce in the physical channel. These differences make possible to distinguish logistics for e-commerce from the broader set of logistics services, identifying a distinct relevant market with special

[14] caso AT.39740 Google Search (Shopping)available on *ec.europa.eu*.

characteristics. The online retailer indeed expresses a demand for services that differ significantly from those required by the classic seller to support its offline business. As a consequence, operators in the sector have begun to develop a logistics service offer expressly intended for e-commerce, capable of satisfying the distinctive characteristics expressed by demand. Some traditional couriers have resorted to vertical integrations with companies active upstream in warehouse logistics (Bartolini,FedEx). However, the emergence of integrated logistics services for e-commerce is mainly linked to the initiative of new companies, which have entered the logistics sector precisely in response to the growth of e-commerce (such as Olympia, Facile web, ConnecHUB), of which Amazon is undoubtedly the leader with its FBA integrated logistics program.

Finally, “pure” freight forwarders are also active in the e-commerce logistics services market, operating only in the downstream phase but offering new delivery services aimed exclusively at online sellers, with a greater focus on the needs of the recipient (receiver oriented) than traditional delivery services.

Regarding *the barriers to entry* for this type of market, it should be noted that the peculiarities of the service required by online sellers necessitate significant investments and organisational and process changes, which are not within the reach of all traditional logistics operators. The Authority has therefore been able to identify a national market for e-commerce logistics services in strong expansion, in which subjects with different characteristics operate on the supply side, through vertical integration formulas or collaboration agreements with other companies, while on the demand side, the main consumers are online retailers, who require one or more logistics sectors in view of their size and business model.

3.2 The Dominant Position

The main indicator of the existence of a dominant position held by an undertaking is given by its market share. Save in exceptional circumstances, a very high share is in itself evidence of the existence of a dominant position, as it places the company that holds it in a position of strength.The existence of a dominant position must also be assessed by taking into account other factors that characterise the companies operating in the identified market and the dynamics of competition, such as the presence of barriers to the entry of new operators or the growth of existing competitors. Therefore, it is useful to analyse the relevance of the Company's market power also in the light of the peculiarities connected to the two-sided nature of marketplaces, as well as the size and overall activity of the Amazon Group. Circumscribing the examination to the Italian marketplace, from the inception of the activity to date, Amazon.it has grown exponentially with regard to all the main indicators. At the end of 2019, the number of items for sale was between 500-1,000 million, of which around 85% belonged to third-party sellers. The number of active users was between 5-10 million, with a combined total of more than 150 million deliveries in Italy. The business model adopted by Amazon is that of a complete ecosystem in which Amazon plays multiple "roles", firstly acting as direct competitor on its platform through the Amazon retail program, than it is the manager of the same intended as a marketplace and provider of complementary services such as advertising, after-sales activities etc...The quantity of services offered increases the popularity of the platform among consumers and their degree of loyalty (also through the creation of specific programmes such as Prime) thus generating "switching costs" from both sides of the market, which decrease the incentive to use competing platforms. In addition, the visibility provided by the platform to retailers' offers turns out to be the main factor in the choice of marketplace. The number of consumers using Amazon.it therefore determines an indirect network effect, as it increases the retailer's interest in being present on the platform, to the detriment of competing marketplaces.

The popularity of the Company's platform is undisputed: the average monthly total unique visits to Amazon.it in 2019 amounted to approximately 150 million. In the same year, the average number of monthly unique visitors to the Italian platform reached 20 million, and the average monthly number of active consumers reached 10 million. From a competitive outlook, this has already translated into a weakening of the competitive capabilities of competitors already present in the market, who have seen their own weight progressively reduced. To date, the contestability of Amazon's position and the ability to discipline new entrants appear to be severely limited by the presence of significant barriers to entry such as; consumer loyalty and preference relevance, variety and breadth of services offered, network effects, popularity and brand reputation.

3.2.1 Dominance Indicators

In order to proceed with a correct analysis of Amazon's dominance, it is first necessary to identify the main companies that to some extent exert a competitive constraint on the company.The marketplaces potentially able to exert a competitive constraint on Amazon are those with an Italian domain or sub-domain. Considering also vertical marketplaces, Amazon.it 's main competitors are: eBay (owner of the Italian domain www.ebay.it), Zalando (www.zalando.it), ePrice (www.eprice.it), ManoMano (www.manomano.it), Aliexpress (with the Italian sub-domain of the site it.aliexpress.com), Wish.

The shares of the players active in the relevant market defined above can be determined by means of different indicators, each highlighting different aspects of Amazon's market power. Taking into account the definition of the relevant market as that of the offer of intermediation services by marketplace operators to third-party sellers, the most appropriate indicator for assessing Amazon's dominance is given by the revenues obtained by marketplace operators for offering such services. The pricing structure applied by all marketplace operators considered for the use of their platform involves commissions charged solely to retailers, while the consumer pays no fees. The services offered to retailers can generally be classified into two groups. 1) The first group includes the compulsory 'sales service' that sellers must subscribe to in order to sell their goods on the platform, with fees that vary from site to site for account management and opening.2) The second group includes “ancillary” services, auxiliary to the sale, the use of which is optional: e.g. 'targeted' advertising services, 'booster' services aimed at increasing the visibility of a seller's product on the marketplace, and logistics services. In the table below, we can find the types of services and the modalities performed by each different operator.

Marketplace	Servizio di vendita	Servizio di pagamento	Servizio di pubblicità / promozione	Servizio di assistenza post-vendita	Servizio di logistica
Amazon.it	√	√	√	√	Sì
eBay.it	√	√	√	X	Interm
Wish.com	√	√	√	√	Parz
Aliexpress.com	√	√	√	√	Interm
Zalando.it	√	√	√	√	Parz
ManoMano.it	√	X	√	X	X
ePrice.it	√	√	√	X	Parz
Bonanza.com	√	X	√	√	X

Fonte: elaborazioni su dati forniti dagli operatori. [15]

Due to the optional nature of the ancillary services, not all of which are offered by each of the marketplaces, it is deemed pertinent and more favourable to the Company to assess the market position of the operators of the various marketplaces on the basis of the revenue obtained by them from the offer of the basic sales service on the platform. Based on this measurement, Amazon enjoys a position of absolute dominance in the market for intermediation services on e-commerce platforms and this position has been strengthened, with an increase of ten percentage points in just three years, from 60 % in 2016 to 80 % in 2019.

[15] Chart 15 AGCM preliminary activity 27623

Marketplace	2016		2017		2018		2019	
	€	%	€	%	€	%	€	%
Amazon.it	[100-500] mln	[65-70]	[100-500] mln	[70-75]	[100-500] mln	[70-75]	[500-1.000] mln	[75-80]
eBay.it	[50-100] mln	[25-30]	[50-100] mln	[15-20]	[50-100] mln	[10-15]	[50-100] mln	[10-15]
Wish.com	-	-	[10-50] mln	[5-10]	[50-100] mln	[5-10]	[10-50] mln	[5-10]
Aliexpress.com	[1-10] mln	[1-5]	[1-10] mln	[1-5]	[1-10] mln	[1-5]	[10-50] mln	[1-5]
Zalando.it	[Inf. a 1] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[1-5]
ManoMano.it	[Inf. a 1] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[1-5]
ePrice.it	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]
Bonanza.com	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]	[1-10] mln	[Inf. a 1]
Totale complessivo	**[100-500] mln**	**100,0**	**[100-500] mln**	**100,0**	**[500-1.000] mln**	**100,0**	**[500-1.000] mln**	**100,0**

Fonte: elaborazioni su dati forniti dagli operatori[242]. [16]

In 2019, Amazon's brokerage revenues were 10 times higher than those of eBay, the second most important horizontal marketplace and the Company's direct competitor on the Italian market. In the period under review (2016-2019), eBay's revenues have remained almost constant, causing its market share to decrease drastically due to the increase in revenues of other operators.

3.2.1.1 Retailer Transaction Value

The market power of a marketplace can also be correctly assessed through the value of sales realised on the platform, referred to as Gross Merchandise Value (GMV), which provides a measure of the overall e-commerce activity realised on the marketplace.

Marketplace	2016		2017		2018		2019	
	€	%	€	%	€	%	€	%
Amazon.it	[1.000-2.000] mln	[45-50]	[2.000-3.000] mln	[55-60]	[3.000-4.000] mln	[65-70]	[4.000-5.000] mln	[70-75]
eBay.it	[1.000-2.000] mln	[40-45]	[1.000-2.000] mln	[30-35]	[1.000-2.000] mln	[20-25]	[500-1.000] mln	[10-15]
Wish.com	[50-100] mln	[1-5]	[100-500] mln	[1-5]	[100-500] mln	[1-5]	[100-500] mln	[1-5]
AliExpress.com	[100-500] mln	[1-5]	[100-500] mln	[1-5]	[100-500] mln	[1-5]	[100-500] mln	[1-5]
Zalando.it	[10-50] mln	[Inf. a 1]	[10-50] mln	[1-5]	[50-100] mln	[1-5]	[100-500] mln	[1-5]
ManoMano.it	[1-10] mln	[Inf. a 1]	[10-50] mln	[Inf. a 1]	[10-50] mln	[Inf. a 1]	[50-100] mln	[1-5]
Bonanza.com	[50-100] mln	[1-5]	[50-100] mln	[1-5]	[50-100] mln	[1-5]	[10-50] mln	[Inf. a 1]
ePrice.it	[10-50] mln	[Inf. a 1]	[10-50] mln	[Inf. a 1]	[10-50] mln	[Inf. a 1]	[10-50] mln	[Inf. a 1]
Totale complessivo	**[3.000-4.000] mln**	**100,0**	**[4.000-5.000] mln**	**100,0**	**[5.000-6.000] mln**	**100,0**	**[5.000-6.000] mln**	**100,0**

Fonte: elaborazioni su dati forniti dagli operatori. [17]

The data show that, in 2016, there was no significant difference between the total value of third-party seller transactions on Amazon.it and eBay.it. In the period under consideration, however, the GMV of retailers on eBay.it declined dramatically and in 2019 is equal to 20% of the value of Amazon.it . In the last available year, therefore, Amazon's market share in terms of GMV of third-party sellers is close to 75%. Completely marginal is the presence in the Italian market of the other horizontal

[16] Chart 16 AGCM preliminary activity 27623
[17] Chart 17 AGCM preliminary activity 27623

platforms (Wish and Aliexpress) and vertical marketplaces (Zalando, ManoMano, ePrice), whose shares in 2019 are less than 5%. Basically, regardless of a single-homing or multihoming choice, retailers active on Italian marketplaces concentrate the vast majority of their sales on Amazon.it.

3.2.1.2 Marketplace Notoriety among Customers and Retailers

Also Amazon's superiority over its competitors in terms of the number of sellers and the number of consumers it manages to attract to its platform provides a relevant indicator in assessing the popularity of the different marketplaces. Amazon's importance can be stated by the total number of retailers and the total number of their products for sale on the marketplaces considered. The number of active retailers, i.e. those who have sold at least one product in a given month on Amazon.it has more than doubled in four years, from around 50,000 at the end of 2016 to almost 200,000 at the end of 2019, while the presence of independent sellers on eBay.it has remained stable at around 10,000 and that of ePrice. it, although growing, amounts to only a few thousand units in 2019, while the number of other companies operating in the marketplace is so small as to be almost irrelevant.The table below shows the number of third-party sellers on marketplaces active in the relevant marketplace.

Marketplace	2016	2017	2018	2019
Amazon.it	*[50-100] mila*	*[50-100] mila*	*[50-100] mila*	*[100-200] mila*
eBay.it	*[10-50] mila*	*[10-50] mila*	*[10-50] mila*	*[10-50] mila*
Wish.com	*[1-10] mila*	*[10-50] mila*	*[10-50] mila*	*[1-10] mila*
ePrice.it	*[1-10] mila*	*[1-10] mila*	*[1-10] mila*	*[1-10] mila*
Bonanza.com	*[1-10] mila*	*[1-10] mila*	*[1-10] mila*	*[1-10] mila*
ManoMano.it	*[100-500]*	*[100-500]*	*[100-500]*	*[500-1.000]*
Zalando.it	*[Inf. a 100]*	*[100-500]*	*[100-500]*	*[100-500]*

Fonte: elaborazioni su dati forniti dagli operatori. [18]

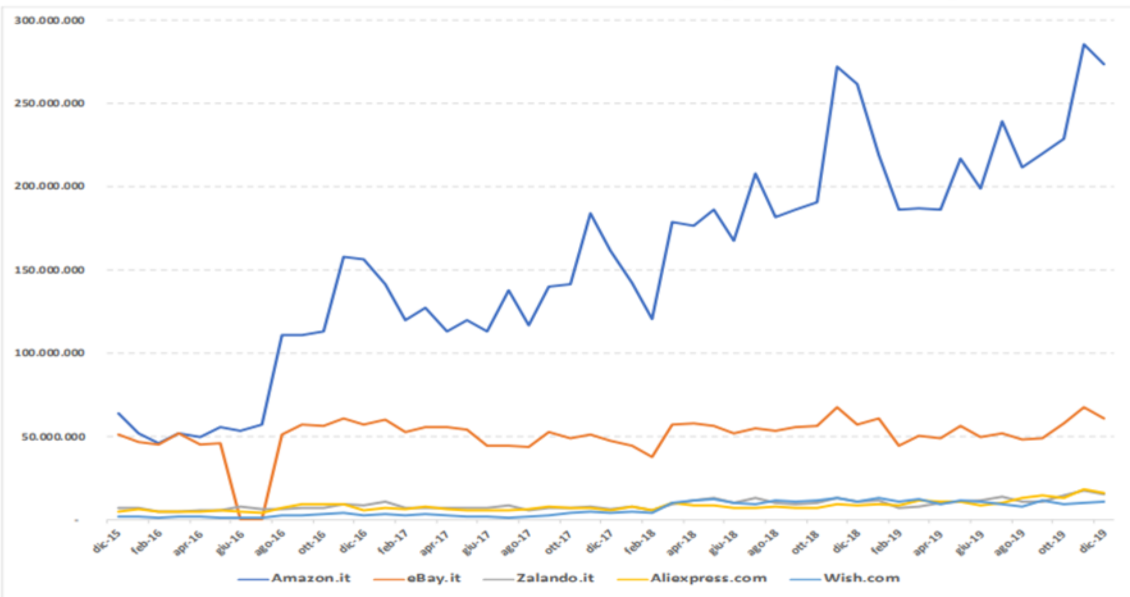
The dominance of Amazon emerges even more clearly when considering the order of importance attributed to marketplaces by multi-homing sellers: the research results[19]show how that 61% of them consider Amazon the most important platform and for a quarter selling on the marketplace is essential. In contrast, retailers who do not consider Amazon to be the most important platform consider being present on a marketplace to be much less important (for only 13% it is essential). The reasons for the importance attributed to Amazon.it by Italian retailers lie mainly in the popularity it enjoys among

[18] Chart 18 AGCM preliminary activity 27623
[19] Survey commissioned by AGCM to Format Research S.r.l. complementary to the preliminary activity 27623.

consumers, thus creating a large shop window and expanding sales possibilities with significantly lower costs. Furthermore, another key driver for sellers is the fast and free delivery service and membership of the Prime programme, which are features of the Amazon.it marketplace that third-party retailers only have access to using Amazon's FBA logistics service.

3.1.2.3 Total Visitors and Active Customers

The number of total visits, i.e. the number of times the platform has been visited in a given period by users, and the number of unique visitors, i.e. the number of different people (a person who visits the site several times during the set period is counted only once) who visited the marketplace during the period, are useful indicators to measure the level of appreciation of a platform from a consumer perspective. The graph below highlights the growth, already since mid-2016, of the total number of monthly visits to Amazon.it and, more importantly, the growing gap with the value of eBay.it, whose trend, as mentioned, is substantially unchanged over the four years considered.



Fonte: dati ComScore forniti da Amazon (doc. 262, all. D5.2). [20]

[20] Figure 22 AGCM preliminary activity 27623.

From a retailer's point of view, the fact that a platform generates a high number of visits may not be sufficient to assess its advantages over competing platforms. The consumer might, in fact, use a platform only for exploratory or comparative purposes, but not trust the level of security of the purchase guaranteed by the operator or, in general, the services offered and, therefore, not conclude the transaction or prefer a competing platform or site. In fact, the "abandonment" rate in e-commerce is between 60% and 80%, which means that 3 out of 4 customers do not complete their purchase. The number of active consumers, i.e. the number of users who have made at least a certain number of purchases in a certain period, is in this sense a relevant measure from a seller's point of view. The table below shows the number of active consumers on each marketplace over the time period in question.

Marketplace	2016	2017	2018	2019
Amazon.it	*[5-10] mln*	*[10-20] mln*	*[10-20] mln*	*[10-20] mln*
eBay.it	*[1-5] mln*	*[1-5] mln*	*[1-5] mln*	*[1-5] mln*
Zalando.it	*[1-5] mln*	*[1-5] mln*	*[1-5] mln*	*[1-5] mln*
AliExpress.com	*[1-5] mln*	*[1-5] mln*	*[1-5] mln*	*[1-5] mln*
Wish.com	*[100-500] mila*	*[500-1.000] mila*	*[1-5] mln*	*[500-1.000] mila*
Bonanza.com	*[500-1.000] mila*	*[1-5] mln*	*[500-1.000] mila*	*[500-1.000] mila*
ManoMano.it	*[Inf. a 100] mila*	*[100-500] mila*	*[100-500] mila*	*[500-1.000] mila*
ePrice.it	*[Inf. a 100] mila*	*[100-500] mila*	*[100-500] mila*	*[100-500] mila*

Fonte: elaborazioni su dati forniti dagli operatori. [21]

Amazon's superiority in converting user visits into product purchases is confirmed by data provided by the company itself(metto sotto dove), which shows a conversion rate (ratio of unique monthly visits by recognised customers to the number of active consumers) of around 30%, with values of around 40% in November and December, thanks to special events and Christmas sales. Also in a study conducted by eBay(metto sotto internal presentation ebay doc 157 all 3) based on 4,000 online shoppers, all respondents are familiar with Amazon.it, 95 % visit it and 91% purchase at least one product on the platform. These percentages are significantly lower for eBay.it (despite 97% knowledge, only 61% visit it and only 44% purchase) and for Zalando.it (94 out of 100 know the site, 42 visit it, only 30 purchase).

3.2.2 Conclusions on Dominance

The elements described above point to a position of super dominance of Amazon in the Italian market for marketplace intermediation services, confirmed on the basis of different indicators Amazon's market share,measured through the revenues deriving from the offer of the sales service, has been

[21] Chart 22 AGCM preliminary activity 27623.

continuously growing since 2016 to date and reached over 75% in 2019, compared to eBay's 10%; moreover, Amazon's significant growth in the period considered occurred, in particular, to the detriment of eBay, its first competitor, marking a distance between the market shares of the two companies, confirmed by all the other indicators analysed. In fact, the number of total visitors, the number of active consumers, and the number of third-party sellers using Amazon.it to sell their products online increased significantly: for each of these indicators, Amazon's values are always double if not triple those of its closest competitor. These results show the existence of a rather limited effective competition, which has diminished over the last few years against Amazon.it on the part of the other marketplaces active in the Italian market. On the basis of the indicators considered, moreover, Amazon's market power is also unequivocal with respect to all the other 'players' in the relevant market as defined above: the Company therefore boasts substantial independence in defining its own behaviour with respect to competitors (marketplaces), customers (retailers) and, ultimately, consumers. Moreover, taking into account the importance of network effects, brand recognition and consumer loyalty strategies, the position held by Amazon on the Italian market for the offer of intermediation services on marketplaces appears, moreover, to be difficult to contend for, not only by current competitors, but also by new operators that might enter the market. The substantial autonomy in defining its own conduct enjoyed by the Company does not appear to be limited even by the threat, ***likely, timely and sufficient*** ,of potential competitors.

4. THE ASSESSMENT PROCEDURE OF THE AMAZON'S CONDUCT: *THE ABUSE*

4.1 The abusive conduct

The evidences gathered in the investigation by the Authority show that Amazon has defined a set of functionalities that allow retailers to obtain greater visibility of their offerings and an improvement in their sales performance on Amazon.it and has conditioned access to these functionalities on the subscription to FBA, the integrated logistics service offered by Amazon itself.

These functionalities can be seen as a single service, a "package" of exclusive and irreplicable benefits devised by Amazon and granted only to retailers who purchase the Company's *optional* logistics service. In fact, these benefits are inaccessible to sellers who handle orders received on Amazon.it , either on their own or through a third-party logistics operator, and therefore, operating on the platform without subscribing to Amazon's service, are not eligible for the benefits guaranteed by FBA.

In this way, the Company has succeeded in illegitimately leveraging the position of dominance held among the marketplaces aimed at Italian consumers in order to reserve for itself a significant advantage over its competitors in the e-commerce logistics market to the detriment of third-party retailers on Amazon.it and consumers. Moreover, this strategy is likely to strengthen the Company's dominant position in the national market for intermediation services on marketplaces: indeed, the FBA package allows, among other advantages, the fact that Amazon does not apply to FBA-managed orders the set of metrics developed by the Company to measure the performance of third-party retailers on Amazon.it. Thus, the level of performance of FBA retailers is not subject to evaluation and control by the platform operator,who assumes responsibility for order completion for the end customer. In addition, Amazon only allows retailers who are customers of its logistics service to bear the Prime label and, although it has implemented an alternative service to FBA that aims to be a viable substitute under the name of SFP , there is to date no programme, alternative to FBA in scope and characteristics, that allows retailers to include their products in Prime and reach the programme's millions of loyal, high-spending subscribers.

Moreover, the admission of one's own products to Prime allows FBA retailers to participate in special events organised by Amazon during the year (Prime Day, Black Friday/Cyber Monday etc.), where they record a much higher number of visits and purchases than the platform average. In summary, FBA removes for retailers any concerns regarding the evaluation of their business by the marketplace operator and constitutes the privileged access key (the only one available to third-party sellers for a long time) to Prime consumers, i.e. the premium demand segment, composed of the most active Amazon consumers and characterised by a high propensity to spend. Therefore, the strategy devised by the Company ties a retailer's success on Amazon.it to the adoption of FBA, which becomes for third-party retailers the indispensable tool for increasing their sales performance.

In the chart below, you can see the two management modes proposed by Amazon for sellers and their respective advantages.

[22]

As mentioned above, the strategy adopted by Amazon has proven to restrict retailers' freedom of choice as to the logistics operator best suited to their business needs and to produce anticompetitive effects to the detriment of Amazon's competitors both in the market for ecommerce logistics services and in the market for marketplace brokerage services. Firstly, by associating the obtainment of exclusive benefits on the marketplace with the adoption of FBA, Amazon has subtracted demand for logistics services for e-commerce from competing operators, since by adhering to FBA, the retailer acquires a complete package of logistics services, even when it would have opted for managing the warehouse by itself and entrusting third party couriers only with the delivery phase, thus harming both companies competing in the intermediation and the couriers themselves.

Secondly, as a result of the costs of the FBA service and the MCF service (through which retailers also delegate to Amazon the handling of orders coming from other sales channels, such as their own website or another marketplace), the abusive pressure to adopt Amazon's logistics service proved to

[22] Figure 23 AGCM preliminary activity 27623

discourage a multi-homing strategy on the part of retailers, thereby restricting the possibility for competing platform operators to be competitive.

Finally, the attribution of exclusive advantages in terms of increased marketplace visibility to only FBA-managed offers is not linked to retailers' sales performance or justified by efficiency objectives, but purely arbitrary and linked to FBA subscription.

4.1.1 Considerations on the Abusive Conduct

The conduct described above can be traced back to a single, complex and articulated exclusionary strategy implemented by the Amazon group in breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU). On the basis of established Case Law, the referability to a single strategy is a sufficient condition to configure such conduct as an abuse of a dominant position. By reason of the dominant position held by Amazon in the market for marketplace brokerage services, the conduct alleged against the Company has been capable of unlawfully distorting and altering competition. In fact, although the existence of a dominant position is not per se incompatible with the rules protecting competition, and the dominant undertaking has the right to protect its own commercial interests and to perform the acts it deems appropriate to protect those interests, it is not allowed for that undertaking to adopt conduct aimed at strengthening its dominant position and abusing it [23], but the firm in a dominant position bears the special responsibility for ensuring that its conduct does not hinder effective competition in the market.

The abusive conduct challenged to Amazon therefore consists in having combined the set of functionalities indispensable for the success of its own offer on Amazon. it, thanks to greater visibility and an increase in sales, with FBA, the logistics service offered by the company. In this way, on its marketplace, Amazon has combined two distinct services: the presence on the platform with favourable conditions (the possibility of not being subject to performance evaluation, of offering products with the Prime label, of selling during special events, and of having a high chance of winning the BuyBox and the FBA service for the fulfilment of orders, in order to create an illicit incentive to purchase FBA, given the absence of alternative ways of accessing the same advantages.

Amazon has made FBA the only avenue available to retailers to obtain indispensable advantages for success on its platform, leveraging its unchallenged dominant position in the market for

[23] TAR Lazio judgement n. 7175 case A487 “CIN-Trasporto Marittimo Merci Sardegna”.

intermediation services that makes Amazon's marketplace an indispensable and irreplaceable showcase and sales channel for online retailers to reach the majority of Italian consumers.

Moreover, the presence of a programme such as FBA is justified neither by reasons related to retailer efficiency nor by a selection related to quality. The Company has, however, rendered the FBA programme as the only logistics service capable of meeting the standards necessary to meet the needs of Prime consumers and, therefore, the only one that can guarantee retailers' offers on Amazon.it access to the package of benefits indispensable for success. In other words, Amazon operates its marketplace without providing a system for evaluating the logistics services provided by competing operators based on clear, ex ante defined and non-discriminatory standards that would allow them to offer third-party sellers access to the same benefits guaranteed by FBA. The Company's strategy thus is proved capable of distorting the competitive comparison between its own logistics service and that offered by competing operators by linking it not to the actual performance of the logistics activity but to the lack of evaluation metrics derived from the purchase of the FBA service.

In conclusion, in the absence of a valid objective justification, the difference in treatment between the logistics service provided by the dominant undertaking and competing services that might be equally efficient constitutes ,as confirmed by the judgment in the Google Search (Shopping) case, a practice extraneous to competition on the merits and therefore constitutes an infringement of Article 102 TFEU.

On the contrary, the combination created by Amazon between FBA and the significant advantages on Amazon.it pursues the sole purpose of distorting competition in the market for e-commerce logistics services to the detriment of the Company's competitors, third-party sellers active on Amazon.it and, finally, consumers.

4.1.2 The Amazon's Strategy

The link created by Amazon between its logistics service (FBA) and the package of benefits described above is the basis of a strategy deliberately devised by the Company to incentivise retailers to use FBA and, indirectly, to induce them to choose single-homing on Amazon.it.

Although the notion of abuse is objective in nature and does not require a finding of exclusionary intent, having deliberately acted in such a manner is an aggravating factor in the Company's conduct. The awareness of the anti-competitive effect is highlighted by the Company's own channels: the link between Amazon's logistics service and the indicators used to measure the performance of third-party sellers on Amazon.it and, in particular, the possibility for these, by adhering to FBA, to see negative feedback from consumers removed, is highlighted in the webinars available on the Company's website, specifically dedicated to explaining to third-party sellers the functioning of the metrics used to assess their activity and the "secrets" to maintain good performances on Amazon.it.

Even more relevant is the content of the *letter to the shareholders*(2015), from which it emerges how FBA represents, in Amazon's intention, much more than a simple logistics service for the retailers active on the platform, but the glue that inextricably binds sellers with loyal customers, to the point that they no longer represent two distinct elements, but are *"happily and profoundly intertwined"*.

Even the tenor of the message that the Company adopts in its promotion of the FBA service is strongly marked by the benefits obtainable by retailers by adhering to Amazon's logistics service, not so much in terms of the quality and efficiency of the service itself, but, above all, of the greater visibility that it guarantees on the marketplace. Exemplary, among all, is the presentation for the training course for account managers(the salespeople in close contact with retailers) in which Amazon states that the key selling point of FBA is to make the retailer's offers more competitive and more visible through access to Prime customers, possession of the Prime logo and increased chances of winning the BuyBox.[24]

Similarly, the *email template*[25] to be sent to retailers to convince them to adopt Amazon's logistics service reiterates that:"*In addition to "pure" logistics, the service maximises performance as it enables benefits strongly linked to visibility on the site and the actual sale*" such as higher sales, higher purchase rate and access to Amazon's Deals.

In conclusion, from the perspective of third-party sellers, FBA is therefore the factor that "changes the rules of the game" in marketplace competition, as it enables their products to become eligible for Prime benefits, which drives their sales so that they can easily increase their transactions volume and reach millions of consumers.

[24] doc. Isp30 slide 22, AGCM preliminary activity 27623 p.196.
[25] doc. Isp74, AGCM preliminary activity 27623 p.197.

4.2 The Elements of the Abusive Conduct

The first exclusive advantage granted by Amazon to retailers active on its marketplace that adopt FBA concerns the application of the metrics system developed by the company for evaluating the performance of retailers: Amazon, in fact, applies the performance metrics described in the preceding paragraphs exclusively to orders handled by the seller on its own or through an external logistics operator, while retailers that subscribe to the FBA service are totally exempt from the application of the same evaluation system.

The non-uniform application of performance metrics constitutes behaviour designed to favour adherence to their own logistics service, which is unjustified for two reasons:

first, the complex system of metric developed by Amazon for evaluating the performance of retailers is based on a set of indicators and sub-indicators designed to measure all aspects related to the handling of an end-consumer's order, not only those most closely related to the processing of the order (packaging, shipping and delivery), but also those inherent in the presentation of the offer and the quality of the product sold. The metrics used by Amazon therefore measure both factors that typically fall within the perimeter of the logistics function and elements that depend on the retailer's actions. For example, negative feedback from a consumer , assessed under the first metric ("defective orders" metto rif sotto) - may depend on whether the product received corresponds to the description provided by the retailer on the marketplace and whether the product itself is defective. The disapplication tout court of this evaluation system to FBA member sellers implies the removal of the latter from systematic scrutiny by Amazon, scrutiny to which, on the contrary, non-FBA sellers are subject and which is capable of conditioning their performance on the platform.

Secondly, with regard to the assessment of the aspects strictly linked to the shipping and delivery of orders, the conduct is unlawful (considering the Company's dual role as operator of the marketplace and provider of the FBA integrated logistics service) because, by not applying the performance control system to FBA retailers, Amazon, as "manager", subtracts on its own marketplace the level of service provided by Amazon as "logistics operator" from the same control system to which it subjects the service offered by its competitors. It practically creates a position of abuse by acting as manager and one of exclusive dominance by acting as a logistics operator because ,it does not subject itself to its own metrics.

Thus, the application of a different and more “lenient” valuation standard is sufficient to consider FBA “by definition” better than any competing logistics service chosen by independent vendors, thus giving its own logistics service and the vendors who use it preferential treatment unencumbered by an objective assessment of merits.

Ultimately, by joining FBA, a retailer not only receives a complete service for managing its warehouse and fulfilling orders received on the marketplace, but above all the guarantee that its performance will not be subject to Amazon's scrutiny using the same criteria used by the Company for non-FBA retailers and, in this way, the certainty of not running any risk of having its *rating downgraded* and its *account suspended* , thus gaining an advantage over competing retailers.

4.2.1 The link between FBA and *Prime*

In order to obtain the Prime badge on products for sale on Amazon.it and to reach Prime subscribers, Amazon requires sellers to delegate order logistics management to the Company by joining its own logistics service, FBA. In this way, Amazon grants FBA retailers an advantage, in terms of increased visibility and sales, that is irreplicable by non-FBA retailers. In particular, obtaining the Prime badge (through FBA subscription) grants retailers a threefold advantage over sellers without such a label. Thus, access to the most lucrative part of the demand side, Prime users, remains foreclosed to sellers wishing to independently choose a logistics operator competing with FBA. (I) First, their products gain preferential access to the 7 million consumers enrolled in Prime, by virtue of the preference given by those users to Prime badged products. (II) Furthermore, due to the working mechanism of the FMA algorithm (metto rif sotto), the Prime badge gives them an appreciable advantage in the "race" for the BuyBox. (III) Lastly, FBA retailers have the possibility to offer their products during special events, days unparalleled in terms of traffic and purchase volume on Amazon.it such as, above all, Black Friday and Prime Day. Specifically, we will now analyse the two main components that represent a competitive advantage for retailers subscribing to the Prime service: access to pillar events and the increased likelihood of getting the buybox.

Access to pillar events: It is Amazon itself that confirms that the use of FBA is the only way for Third Party Sellers to obtain Prime badges on their products and thereby gain access to consumers enrolled in the same program: "Prior to the launch of the Seller Fulfilled Prime ("SFP") program on the Amazon.it shop in 2019 [...], sellers were able to offer their products through the Prime program to the extent that they used the FBA service"[26] .

[26] Doc 242 AGCM preliminary activity 27623.

Similarly, the Company stated that, during promotional events, '[...] Amazon's system does not support the creation of offers by retailers on products that do not use FBA or SFP' [27] .Again, therefore, Amazon makes a highly visible, high-profit opportunity on its marketplace accessible to third-party retailers on condition that they use FBA.

Amazon, in its defence, states that the reason for awarding the Prime badge only to FBA retailers would be the impossibility of monitoring on a continuous and accurate basis the orders handled directly by retailers. Only with regard to offers delivered via the Amazon Fulfillment Network (i.e. FBA products and those sold by Amazon Retail) Amazon has full visibility and "end-to-end" control over the order fulfilment process, thus being able to take the necessary actions to ensure that customers receive the level of service they expect under the Prime programme and to ensure the quality of offers during pillar events. Due to the rules currently in force at Amazon.it, there is, in other words, no possibility for a third-party seller who chooses an independent logistics operator, or even a carrier for the delivery of orders received on Amazon.it, to compete on an equal footing with FBA by demonstrating that it can meet the high performance levels required by Amazon for access to the Prime programme. Taking the data into account, during promotional events, the number of visitors to the marketplace is much higher (from [30-40%] to [60-70%] more than on a normal day of the same month) and the number of visits translates into a purchase to a much greater extent than on normal days. Consequently, subscribing to the prime programme also becomes indispensable for retailers to gain visibility in the marketplace.

Higher probability of getting the BuyBox: The FMA algorithm used by Amazon to choose the Featured Offer and assign the BuyBox distinguishes between third-party sellers on the basis of the logistics service used: The algorithm scores the different offers through a two-step mechanism: a pre-qualification and a ranking step. The retailer's decision to outsource logistics to Amazon influences the outcome of both phases, giving it a higher probability of winning the BuyBox than a seller that handles orders received on Amazon.it differently. Firstly, the automatic exclusion of a non-FBA offer operates in the ***"pre-qualification"*** phase, when for the same product the retailer also proposes an FBA offer whose price is 20-30% higher than that of the offer not handled directly by Amazon. This therefore implies that the retailer cannot "discharge" to the final consumer any cost advantage

[27] doc. 182 AGCM preliminary activity 27623.

that it may achieve by using a logistics operator that is significantly more efficient than FBA, on pain of disqualifying its offer from winning the BuyBox.

Even more evident is the disparity operated in the ***second bid ranking phase***: in the case of FBA bids in fact, the algorithm automatically assigns a maximum value to seller's performance evaluation metrics because, as seen, Amazon does not apply such evaluation metrics to bids it manages with its own logistics service, which are ultimately the only ones eligible to obtain the Prime badge. Therefore, a non-FBA bid competing with an FBA bid for the BuyBox award will, all other factors being equal, start at a double disadvantage, due not to the quality and performance of the relevant logistics service, but to the mere fact that it is not operated by Amazon.

4.3 The Unsuitability of SFP to terminate the contested conduct

In its own defences, Amazon argued that the introduction of the SFP programme on Amazon.it prevents the need to purchase the Company's logistics service in order to access the platform's bundle of features that provide high visibility and increased sales to retailers' offerings.

Theoretically, through SFP, sellers, after passing a qualification process that recognises their warehouse management capabilities according to standards deemed appropriate to the Prime experience and using the delivery services of carriers that Amazon qualifies as "eligible" to meet those standards, have the ability to access the same benefits provided to the Company's FBA-managed offerings. In this way, SFP would constitute an alternative to FBA and would therefore be capable of putting an end to the conduct challenged by the Authority.

The preliminary findings have highlighted the existence of a section of retailers attracted by the sale on Amazon.it and by the relative privileges, for whom, due to reasons connected to the characteristics of their products (such as type, bulkiness, etc.), FBA may prove to be particularly onerous and unsuitable for the specific needs of the seller, who, for example, due to the high stocking rates of the products in the Fulfillment centres, is disincentivised to use FBA.

This group of retailers thus manages its logistics in-house and accounts for about 30% of the total retailers on Amazon, and is a part of the demand for logistics services that is unattainable for the company because it is not interested in the FBA programme.

With SFP, Amazon devised a mode of access to Prime aimed precisely at this group of sellers. However, contrary to the Company's repeated assertions, SFP is not, as conceived and implemented in Italy, a mode of access to Prime that leaves retailers free to choose logistics services provided by operators competing with Amazon.

In its capacity as operator of the marketplace Amazon has an interest in maintaining the perception that final consumers, especially Prime customers, have of the platform. It is recognised, therefore, the Company's need to define the standards that it considers adequate to guarantee the shopping experience of this category of consumers and to require that the same be met by third party sellers active on the marketplace in order to be able to associate the Prime badge to their offers.

As of today, however, within SFP, the Company does not merely set the standards necessary to qualify for and obtain the Prime badge, but defines the terms and conditions of the contractual relationship between SFP sellers and Prime Carriers, going so far as to negotiate with the latter the price of their delivery service to sellers. Thus, the management of the fulfilment of an order from a vendor included in SFP is still entirely dependent on Amazon, as much in the choice of the delivery carrier as in the terms and conditions of the service provided to sellers.

As it is clear from the documents provided by the Company to the Authority, the price proposed for the delivery service of SFP orders was the determining criterion for the evaluation of the offers submitted by the operators contacted to become Prime Carriers. In particular, in the contracts with TNT and Bartolini, which represent the two Prime qualified carriers, some clauses turned out to be too stringent and inconsistent with the application of SFP:

First, the central element of the agreement is the tariffs to be charged by the two couriers to SFP sellers. These rates are broken down by weight/volume bands and staggered according to the volume of orders entrusted by the seller to the courier. Unlike other delivery service terms, the agreements provide for a limitation of the carrier's right to unilaterally change the rates. In fact, the framework agreement with the couriers excludes the possibility of unilateral modification by TNT or BRT of the tariff conditions applied to sellers, providing that the tariffs can only be modified with the mutual consent of the Parties. Such a constraint appears, in the view of the Authority, completely unjustified and invasive of the freedom of negotiation between the courier and its customers.

Secondly, with reference to the invoicing of the amounts owed by the SFP Sellers to the Prime Carrier, for TNT the EU Framework Agreement(Accordo Quadro EU) provides for direct invoicing by Amazon, which will be extended, in the future, also to the Italian market, once the transitional period of direct invoicing by TNT has ended. This appears to be entirely without justification and replaces Amazon for TNT in the direct relationship with the seller.

In short, the participation in SFP of the carriers, competitors of the Company in the delivery service, is not based on the verification of compliance with predefined, objective and monitorable quality standards of the service provided, but on their willingness to accept contractual conditions defined by Amazon, both in their relations with the Company and in their relations with the SFP vendors.

In conclusion, SFP represents an instrument under the Company's full control, capable of intercepting and conditioning a further share of the demand for active logistics services, in addition to that captured through FBA. The association of Prime benefits with SFP represents, as with FBA, the “bonus” offered to these vendors as an incentive to join the programme.

From this perspective, SFP represents a further manifestation of the Company's abusive intent and is likely to reinforce the negative effects on competition in e-commerce logistics services.

CONCLUSION

In order to find an infringement of Article 102 TFEU, it is sufficient to show that the abusive conduct of the dominant undertaking aims to restrict competition: consumers must be able to benefit from the highest possible degree of competition in the market and, at the same time, competitors must be able to compete on the merits for the entire market and not just a part of it, without the dominant undertaking being able to justify its conduct by saying that its competitors are free to compete in other segments of the market. The abusive strategy adopted by Amazon thus proved capable of restricting retailers' freedom of choice as to the logistics operator best suited to their business needs. This strategy, taking into account the characteristics of FBA, allowed the company to extend its significant influence in the market for e-commerce logistics services and to strengthen its dominant position in that of marketplace intermediation services to the detriment of competing operators and, ultimately, consumers.

In the market for logistics services, FBA, as mentioned above, is a 'one-stop shop' formula involving the purchase of the complete set of services necessary for a retailer to manage the entire process of fulfilling an online order. FBA not only competes in the market for logistics services, but is also able to intercept the demand for carrier delivery services expressed by retailers who perform upstream logistics activities in-house. By subordinating all sales benefits on the marketplace to the FBA subscription, Amazon's strategy has succeeded in curbing the development of competing integrated logistics formulas that have structured their services around the emerging needs of B2C operators.

Moreover, in order to reach the minimum efficient size and to be competitive on the market, new e-commerce logistics operators need to intercept the demand of a significant number of operators, and Amazon's growth in the logistics market, in the proportions described above, has therefore represented a real "upheaval". The Authority calculated that in terms of turnover, products handled with FBA accounted for approximately 70% of the total value of third-party sellers' orders on Amazon.co.uk in 2019 compared to 40% in 2016, before the abusive conduct.

Secondly, Amazon's unlawful coupling of its own logistics service with exclusive marketplace advantages was suitable to suppress the incentive of retailers active on Amazon.it to simultaneously use competing marketplaces to propose their offerings to consumers (suppressing multihoming strategies). In this way, the abusive strategy adopted by the Company enabled it to strengthen its position in the market for intermediation services on e-commerce platforms.

Indeed, the use of a single courier for the delivery of orders from the various sources is indispensable to achieve economies of scale, and Amazon is an obligatory counterpart for sellers wishing to offer their products online. Given this obligatory choice, the presence on competing platforms depends on the cost-benefit ratio of such a diversification of supply.

Once adhered to FBA, the retailer wishing to be present on more than one marketplace must therefore analyse the cost of logistics for orders from competing platforms on which it decides to propose its offer in addition to its 'obligatory' presence on Amazon.it . This inevitably leads, given FBA's stringent policies in terms of fees applied and return policies, to a duplication of costs related to the management of multiple warehouses for a retailer, which inevitably discourages the adoption of a multi-homing strategy.

In conclusion, the investigation has shown that the conduct implemented by the Amazon group constitutes a unitary, complex and articulated strategy with an exclusionary purpose in breach of Article 102 TFEU, by granting on its Italian marketplace exclusive advantages only to third-party retailers that adhere to the FBA logistics service. Amazon's strategy proved to be capable of altering the competitive dynamics in the e-commerce logistics market and in the marketplace intermediation services market by taking away from Amazon's competitors a significant part of the demand for e-commerce logistics services and discouraging the adoption of a multihoming strategy for retailers, with obvious prejudice for alternative logistics service providers.

Overall, the Authority, considering the duration of the offence quantified in almost 6 years, calculated the amount of the fine, following the Guidelines of Article 15 paragraph 1 of Law 287/90, at **EUR 1,128,596. 156.33** and has imposed behavioural measures on Amazon that will be submitted to the scrutiny of a monitoring trustee,in particular, Amazon will have to grant all sales privileges and visibility on its platform to all third-party sellers who are able to respect fair and non-discriminatory standards for the fulfilment of their orders, in line with the level of service that Amazon intends to guarantee to Prime consumers and to refrain from negotiating with carriers and/or competing logistics operators, on behalf of sellers, tariffs and other contractual conditions applied for the logistics of their orders on Amazon. it, outside of FBA. Although the whole affair is still in progress, the importance of this case certainly emerges, both in quantitative terms (as we said,it is the highest penalty ever requested by the Italian antitrust authorities and one of the highest in the global historical panorama), and with regard to the approach of the AGCM to the case. As well as with regard to the Authority's approach to the online market, which, although now fully integrated into the global economy, is not easy to interpret in legal terms, as there are still no specific directives for intervention on them, and underlines the growing attention that the national competition supervisory body reserves for the digital ecosystem and its protagonists, who, when they reach the threshold of dominance, must be subject to special responsibilities and on the markets in which they operate and like any other company that enjoys economic power on a non-digital market. Regardless of how the case will end, the proceedings have undoubtedly represented a consolidation of the AGCM's position in the supervision of online markets, opening the door to increasingly effective interventions and increasingly severe sanctions for those who unlawfully restrict or influence the common welfare.

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