

Amazon is not essential, except to the EU's flawed investigations

March 28, 2019

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Summary

Amazon has largely avoided the crosshairs of antitrust enforcers to date (leaving aside the embarrassing dangerous threats of arbitrary enforcement by some US presidential candidates). The reasons seem obvious: in the US it handles a mere 5% of all retail sales (with lower shares in the EU), and it consistently provides access to a wide array of affordable goods. Yet even with Amazon's obvious lack of dominance in the general retail market, the EU and some of its member states are opening investigations.

This isn't new: the EU and its member states have pursued many competition claims against the big tech platforms. In the last two years alone, the EU imposed over \$9B USD in fines on Google for "harms" that were highly speculative and hard to square with concern for consumers.

The theories of harm in the pending investigations of Amazon demonstrate some of the same confused antitrust theories that cropped up in the EU *Google Shopping* case. Platforms like Amazon and Google are criticized for allegedly discriminating against certain platform users who are also competitors or potential competitors of one or more of the platform's services (or, in some cases, the platform itself).

Commissioner Margarethe Vestager's probe into Amazon came to light in September, and centers on whether Amazon is illegally using its dominant position vis-à-vis third party merchants on its platforms in order to obtain data that it then uses either to promote its own direct sales, or else to develop competing products under its private label brands. More recently, Austria and Germany have launched separate investigations of Amazon rooted in much the same concerns as those of the European Commission.

The Austrian investigation will examine "whether Amazon abused its dominant position against retailers, that are active on the Amazon market place." According to Andreas Mundt, president of the German competition authority, "Amazon functions as a kind of 'gatekeeper' [for sellers' access] to customers. Its double role as the largest retailer and largest marketplace has the potential to hinder other sellers on its platform." The German investigation also focuses on whether the terms of the contractual relationships that third-party sellers enter into with Amazon are unfair because these sellers are "dependent" on it.

Claims of competitive harm arising from this so-called vertical discrimination or bias are

light on both theory and empirics. One of the fundamental, erroneous assumptions upon which they are built is the alleged “essentiality” of the underlying platform or input. But these cases are more often based on stories of firms that, unfortunately, *chose* to build their businesses to rely on a specific platform. In other words, their own decisions — from which they substantially benefited — made their investments highly “asset specific” and thus vulnerable to otherwise avoidable risks. When a platform on which these businesses rely makes a disruptive move, the third parties cry foul, even though the platform was not — nor should have been — under any obligation to preserve the status quo on behalf of third parties.

This issue brief explores the flaws in designating Amazon as something like an “essential facility,” as well as the attendant errors of treating the *distribution mechanism* of Internet-based commerce as though it were a market definition, and the problems with failing to learn the innovation-damaging effects of the *Microsoft* case.

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