Amazon Italy's Efficiency Offense
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Early last month, the Italian competition authority issued a record 1.128 billion euro fine against Amazon for abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU). In its order, the Agenzia Garante della Concorrenza e del Mercato (AGCM) essentially argues that Amazon has combined its Amazon.it marketplace and Fulfillment by Amazon (FBA) services to exclude logistics rivals such as FedEx, DHL, UPS, and Poste Italiane.

The sanctions came exactly one month after the European General Court seconded the European Commission's "discovery" in the *Google Shopping* case of a new antitrust infringement known as "self-preferencing," which also cited Article 102 TFEU. Perhaps not entirely coincidentally, legislation was introduced in the United States earlier this year to prohibit the practice. Meanwhile, the EU's legislative bodies have been busy taking steps to approve the Digital Markets Act (DMA), which would regulate so-called digital "gatekeepers."

Italy thus joins a wave of policymakers that have either imposed heavy-handed decisions to "rein in" online platforms, or are seeking to implement *ex ante* regulations toward that end. Ultimately, the decision is reminiscent of the self-preferencing prohibition contained in Article 6a of the current draft of the DMA and reflects much of what is wrong with the current approach to regulating tech. It presages some of the potential problems with punishing efficient behavior for the sake of protecting competitors through "common carrier antitrust." However, if this decision is anything to go by, these efforts will end up hurting the very consumers authorities purport to protect and lending color to more general fears over the DMA.

In this post, we discuss how the AGCM's reasoning departs from sound legal and economic thinking to reach a conclusion at odds with the traditional goal of competition law—i.e., the protection of consumer welfare. Neo-Brandeisians and other competition scholars who dispute the centrality of the consumer welfare standard and would use antitrust to curb "bigness" may find this result acceptable, in principle. But even they must admit that the AGCM decision ultimately serves to benefit large (if less successful) competitors, and not the "small dealers and worthy men" of progressive lore.

Relevant Market Definition

Market definition constitutes a preliminary step in any finding of abuse under Article 102

TFEU. An excessively narrow market definition can result in false positives by treating neutral or efficient conduct as anticompetitive, while an overly broad market definition might allow anticompetitive conduct to slip through the cracks, leading to false negatives.

Amazon Italy may be an example of the former. Here, the AGCM identified two relevant markets: the leveraging market, which it identified as the Italian market for online marketplace intermediation, and the leveraged market, which it identified as the market for e-commerce logistics. The AGCM charges that Amazon is dominant in the former and that it gained an illegal advantage in the latter. It found, in this sense, that online marketplaces constitute a uniquely relevant market that is not substitutable for other offline or online sales channels, such as brick-and-mortar shops, price-comparison websites (e.g., Google Shopping), or dedicated sales websites (e.g., Nike.com/it). Similarly, it concluded that e-commerce logistics are sufficiently different from other forms of logistics as to comprise a separate market.

The AGCM's findings combine qualitative and quantitative evidence, including retailer surveys and "small but significant and non-transitory increase in price" (SSNIP) tests. They also include a large dose of speculative reasoning.

For instance, the AGCM asserts that online marketplaces are fundamentally different from price-comparison sites because, in the latter case, purchase transactions do not take place on the platform. It asserts that e-commerce logistics are different from traditional logistics because the former require a higher degree of automation for transportation and storage. And in what can only be seen as a normative claim, rather than an objective assessment of substitutability, the Italian watchdog found that marketplaces are simply *better* than dedicated websites because, e.g., they offer greater visibility and allow retailers to save on marketing costs. While it is unclear what weights the AGCM assigned to each of these considerations when defining the relevant markets, it is reasonable to assume they played *some* part in defining the nature and scope of Amazon's market presence in Italy.

In all of these instances, however, while the AGCM carefully delineated superficial distinctions between these markets, it did not actually establish that those differences are relevant to competition. Fetishizing granular but ultimately irrelevant differences between products and services—such as between marketplaces and shopping comparison sites—is a sure way to incur false positives, a misstep tantamount to punishing innocuous or efficient business conduct.

Dominance

The AGCM found that Amazon was "hyper-dominant" in the online marketplace intermediation market. Dominance was established by looking at revenue from marketplace sales, where Amazon's share had risen from about 65% in 2016 to 75% in 2019. Taken in isolation, this figure might suggest that Amazon's competitors cannot thrive in the market. A broader look at the data, however, paints a picture of more generalized growth, with some segments greatly benefiting newcomers and small, innovative marketplaces.

For instance, virtually all companies active in the online marketplace intermediation market have experienced significant growth in terms of monthly visitors. It is true that Amazon's visitors grew significantly, up 150%, but established competitors like Aliexpress and eBay also saw growth rates of 90% and 25%, respectively. Meanwhile, Wish grew a massive 10,000% from 2016 to 2019; while ManoMano and Zalando grew 450% and 100%, respectively.

In terms of active users (i.e., visits that result in a purchase), relative numbers seem to have stayed roughly the same, although the AGCM claims that eBay saw a 20-30% drop. The number of third-party products Amazon offered through Marketplace grew from between 100 and 500 million to between 500 million and 1 billion, while other marketplaces appear to have remained fairly constant, with some expanding and others contracting.

In sum, while Amazon has undeniably improved its position in practically all of the parameters considered by the AGCM, indicators show that the market as a whole has experienced and is experiencing growth. The improvement in Amazon's position relative to some competitors—notably eBay, which AGCM asserts is Amazon's biggest competitor—should therefore not obscure the fact that there is entry and expansion both at the fringes (ManoMano, Wish), and in the center of the market for online marketplace intermediation (Aliexpress).

Amazon's Allegedly Abusive Conduct

According to the AGCM, Amazon has taken advantage of vertical integration to engage in self-preferencing. Specifically, the charge is that the company offers exclusive and purportedly crucial advantages on the Amazon.it marketplace to sellers who use Amazon's own e-commerce logistics service, FBA. The purported advantages of this arrangement include, to name a few, the coveted Prime badge, the elimination of negative user feedback on sale or delivery, preferential algorithmic treatment, and exclusive participation in Amazon's sales promotions (e.g., Black Friday, Cyber Monday). As a result, according to the AGCM, products sold through FBA enjoy more visibility and a better chance to win the "Buy Box."

The AGCM claims this puts competing logistics operators like FedEx, Poste Italiane, and DHL at a disadvantage, because non-FBA products have less chance to be sold than FBA products, regardless of any efficiency or quality criteria. In the AGCM's words, "Amazon has stolen demand for other e-commerce logistics operators."

Indirectly, Amazon's "self-preferencing" purportedly also harms competing marketplaces like eBay by creating incentives for sellers to single-home—i.e., to sell only through Amazon Marketplace. The argument here is that retailers will not multi-home to avoid duplicative costs associated with FBA, e.g., storing goods in several warehouses.

Although it is not necessary to demonstrate anticompetitive effects under Article 102 TFEU, the AGCM claims that Amazon's behavior has caused drastic worsening in other marketplaces' competitive position by constraining their ability to reach the minimum scale needed to enjoy direct and indirect network effects. The Italian authorities summarily assert that this results in consumer harm, although the gargantuan 250-page decision spends scarcely one paragraph on this point.

Intuitively, however, Amazon's behavior should, in principle, *benefit* consumers by offering something that most find tremendously valuable: a guarantee of quick delivery for a wide range of goods. Indeed, this is precisely why it is so misguided to condemn self-preferencing by online platforms.

As some have already argued, we cannot assume that something is bad for competition just because it is bad for certain competitors. For instance, a lot of unambiguously procompetitive behavior, like cutting prices, puts competitors at a disadvantage. The same might be true for a digital platform that preferences its own service because it is generally better than the alternatives provided by third-party sellers. In the case at hand, for example, Amazon's granting marketplace privileges to FBA products may help users to select the products that Amazon can guarantee will best satisfy their needs. This is perfectly plausible, as customers have repeatedly shown that they often prefer less open, less neutral options.

The key question, therefore, should be whether the behavior in question excludes equally efficient rivals in such a way as to harm consumer welfare. Otherwise, we would essentially be asking companies to refrain from offering services that benefit their users in order to make competing products comparatively more attractive. This is antithetical to the nature of competition, which is based on the principle that what is good for consumers is frequently bad for competitors.

AGCM's Theory of Harm Rests on Four Weak Pillars

Building on the logic that Amazon enjoys "hyper-dominance" in marketplace intermediation; that most online sales are marketplace sales; and that most marketplace sales are, in turn, Amazon.it sales, the AGCM decision finds that succeeding on Amazon.it is indispensable for any online retailer in Italy. This argument hinges largely on whether online and offline retailers are thought of as distinct relevant markets—i.e., whether, from the perspective of the retailer, online and offline sales channels are substitutable (see also the relevant market definition section above).

Ultimately, the AGCM finds that they are not, as online sales enjoy such advantages as lower fixed costs, increased sale flexibility, and better geographical reach. To an outsider, the distinction between the two markets may seem artificial—and it largely is—but such theoretical market segmentation is the bread-and-butter of antitrust analysis. Still, even by EU competition law standards, the relevant market definitions on which the AGCM relies to conclude that selling on Amazon is indispensable appear excessively narrow.

This market distinction also serves to set up the AGCM's second, more controversial argument: that the benefits extended to products sold through the FBA channel are *also* indispensable for retailers' success on the Amazon.it marketplace. Here, the AGCM seeks a middle ground between competitive advantage and indispensability, finally settling on the notion that a sufficiently large competitive advantage itself translates into indispensability.

But how big is too big? The facts that 40-45% of Amazon's third-party retailers do not use FBA (p. 57 of the decision) and that roughly 40 of the top 100 products sold on Amazon.it are not fulfilled through Amazon's logistics service (p. 58) would appear to suggest that FBA is more of a *convenience* than an obligation. At the least, it does not appear that the advantage conferred is so big as to amount to indispensability. This may be because sellers that choose not to use Amazon's logistics service (including offline, of course) can and do cut prices to compete with FBA-sold products. If anything, this should be counted as a *good* thing from the perspective of consumer welfare.

Instead, and signaling the decision's overarching preoccupation with protecting some businesses at the expense of others (and, ultimately, at the expense of consumers), the AGCM has expanded the already bloated notion of a self-preferencing offense to conclude that expecting sellers to compete on pricing parameters would unfairly slash profit margins for non-FBA sellers.

The third pillar of the AGCM's theory of harm is the claim that the benefits conferred on products sold through FBA are not awarded based on any objective quality criteria, but purely on whether the seller has chosen FBA or third-party logistics. Thus, even if a logistics operator were, in principle, capable of offering a service as efficient as FBA's, it would not qualify for the same benefits.

But this is a disingenuous line of reasoning. One legitimate reason why Amazon could choose to confer exclusive advantages on products fulfilled by its own logistics operation is because no other service is, in fact, routinely as reliable. This does not necessarily mean that FBA is *always* superior to the alternatives, but rather that it makes sense for Amazon to adopt this presumption a general rule based on past experience, without spending the resources to constantly evaluate it. In other words, granting exclusive benefits *is* based on quality criteria, just on a prior measurement of quality rather than an ongoing assessment. This is presumably what a customer-obsessed business that does not want to take chances with consumer satisfaction would do.

Fourth, the AGCM posits that Prime and FBA constitute two separate products that have been artificially tied by Amazon, thereby unfairly excluding third-party logistics operators. Co-opting Amazon's own terminology, the AGCM claims that the company has created a flywheel of artificial interdependence, wherein Prime benefits increase the number of Prime users, which drives demand for Prime products, which creates demand for Prime-eligible FBA products, and so on.

To support its case, the AGCM repeatedly adduces a 2015 letter in which Jeff Bezos told shareholders that Amazon Marketplace and Prime are "happily and deeply intertwined," and that FBA is the "glue" that links them together. Instead of taking this for what it likely is—i.e., a case of legitimate, efficiency-enhancing vertical integration—the AGCM has preferred to read into it a case of illicit tying, an established offense under Article 102 TFEU whereby a dominant firm makes the purchase of one product conditional on the purchase of another, unrelated one.

The problem with this narrative is that it is perfectly plausible that Prime and FBA are, in fact, meant to be one product that is more than the sum of its parts. For one, the inventory of sellers who use FBA is stowed in fulfillment centers, meaning that Amazon takes care of all logistics, customer service, and product returns. As Bezos put it in the same 2015 letter, this is a huge efficiency gain. It thus makes sense to nudge consumers towards products that use FBA.

In sum, the AGCM's case rests on a series of questionable assumptions that build on each other: a narrow relevant market definition; a finding of "hyper-dominance" that downplays competitors' growth and expansion, as well as competition from outside the narrowly defined market; a contrived notion of indispensability at two levels (Marketplace and FBA); and a refusal to contemplate the possibility that Amazon integrates its marketplace and logistics services in orders to enhance efficiency, rather than to exclude competitors.

Remedies

The AGCM sees "only one way to restore a level-playing field in e-commerce logistics": Amazon must redesign its existing Self-Fulfilled Prime (SFP) program in such a way as to grant all logistics operators—FBA or non-FBA—equal treatment on Amazon.it, based on a set of objective, transparent, standard, uniform, and non-discriminatory criteria. Any logistics operator that demonstrates the ability to fulfill such criteria must be awarded SFP status and the accompanying Prime badge, along with all the perks associated with it. Further, SFP- and FBA-sold products must be subject to the same monitoring mechanism with regard to the observance of Prime standards, as well as to the same evaluation standards.

In sum, Amazon Italy now has a duty to treat Marketplace sales fulfilled by third-party operators the same as those fulfilled by its own logistics service. This is a significant step toward "common carrier antitrust." in which vertically integrated firms are expected to comply with perfect neutrality obligations with respect to customers, suppliers, *and competitors*.

Beyond the philosophical question of whether successful private companies should be obliged by law to treat competitors analogously to its affiliates (they shouldn't), the pitfalls of this approach are plain to see. Nearly all consumer-facing services use choice architectures as a means to highlight products that rank favorably in terms of price and quality, and ensuring consumers enjoy a seamless user experience: Supermarkets offer house brands that signal a product has certain desirable features; operating system developers pre-install certain applications to streamline users' "out of the box "experience;

app stores curate the apps that users will view; search engines use specialized boxes that anticipate the motives underlying users' search queries, etc. Suppressing these practices through heavy-handed neutrality mandates is liable to harm consumers.

Second, monitoring third-party logistics operators' compliance with the requisite standards is going to come at a cost for Amazon (and, presumably, its customers)—a cost likely much higher than that of monitoring its own operations—while awarding the Prime badge liberally may deteriorate the consumer experience on Amazon Marketplace.

Thus, one way for Amazon to comply with AGCM's remedies while also minimizing monitoring costs is simply to dilute or even remove the criteria for Prime, thereby allowing sellers using any logistics provider to be eligible for Prime. While this would presumably insulate Amazon from any future claims against exclusionary self-preferencing, it would almost certainly also harm consumer welfare.

A final point worth noting is that vertical integration may well be subsidizing Amazon's own first-party products. In other words, even if FBA is not fully better than other logistics operators, the revenue that it derives from FBA enables Amazon to offer low prices, as well as a range of other benefits from Prime, such as, e.g., free video. Take that source of revenue away, and those subsidized prices go up and the benefits disappear. This is another reason why it may be legitimate to consider FBA and Prime as a single product.

Of course, this argument is moot if all one cares about is how Amazon's vertical integration affects competitors, not consumers. But consumers care about the whole package. The rationale at play in the AGCM decision ultimately ends up imposing a narrow, boring business model on all sellers, precluding them from offering interesting consumer benefits to bolster their *overall* product.

Conclusion

Some have openly applauded AGCM's use of EU competition law to protect traditional logistics operators like FedEx, Poste Italiane, DHL, and UPS. Others lament the competition authority's apparent abandonment of the consumer welfare standard in favor of a renewed interest in punishing efficiency to favor laggard competitors under the guise of safekeeping "competition." Both sides ultimately agree on one thing, however: *Amazon Italy* is about favoring Amazon's competitors. If competition authorities insist on continuing down this populist rabbit hole, the best they can hope for is a series of Pyrrhic victories against the businesses that are most bent on customer satisfaction, i.e., the successful ones.

Some may intuitively think that this is fair; that Amazon is just too big and that it strangles small competitors. But Amazon's "small" competitors are hardly the "worthy men" of Brandeisian mythology. They are FedEx, DHL, UPS, and the state-backed goliath Poste Italiane; they are undeniably successful companies like eBay, Alibaba – or Walmart in the United States. It is, conversely, the smallest retailers and consumers who benefit the most from Amazon's integrated logistics and marketplace services, as the company's meteoric rise in popularity in Italy since 2016 attests. But it seems that, in the brave new world of antitrust, such stakeholders are now too small to matter.

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