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## I. INTRODUCTION

Has the digital economy turned into a jungle? And in case it has, what type of jungle is it and shall we do anything about it? For some, we already live in a so-called triple canopy jungle, that is "the deepest part of the jungle... where tall trees block out all the light and nothing can grow on the ground."<sup>2</sup> According to this view, the GAFA (Google, Amazon, Facebook, and Apple), FAANG (Facebook, Apple, Amazon, Netflix, and Google), MAGAF (Microsoft, Amazon, Google, Apple, and Facebook), "Frightful Five," or robber barons of this world are like tall trees stopping much of the sunlight entering the jungle and thereby stifling the growth of new life on the forest floor. For others, the triple canopy metaphor would be too simplistic, as it fails to take into consideration a full set of other factors that influence how a healthy forest ecosystem truly develops. Instead of tall trees blocking the light, Big Tech should be better viewed as lighthouses pointing to where relevant competition takes place and indirectly governing, and presiding over, other firms' innovation efforts.<sup>3</sup>

These and related questions are currently discussed in several distinguished fora, not least the OECD<sup>4</sup> and the U.S. Federal Trade Commission. From September 2018 through February 2019, the latter is holding a series of hearings devoted to important topics such as the "Identification and Analysis of Collusive, Exclusionary, and Predatory Conduct by Digital and Technology-Based Platform Businesses" and the "Antitrust Framework for Evaluating Acquisitions of Potential or Nascent Competitors in Digital Marketplaces."<sup>5</sup>

There is also a clear trend, at least in the EU, to step up public competition enforcement in the tech sector. Compared to their U.S. counterparts, authorities on this side of the Atlantic have gained increasing confidence in their capabilities to pursue the often exploratory and very complex cases that emerge from the digital economy. Regarding the GAFA,

2 J. Tepper & D. Hearn, "If You Don't Think Today's Tech Giants Are Vicious, Just Ask Venture Capitalists," Pro Market, November 27, 2018, <https://promarket.org/silicon-valley-vicious-dark-jungle/> (excerpt from the book "The Myth of Capitalism: Monopolies and the Death of Competition" Wiley: 2018).

3 N. Petit, Technology Giants, the "Moligopoly" Hypothesis and Holistic Competition: A Primer, Working Paper, October 20, 2016; see also @CompetitionProf (alias N. Petit), Tweet, December 1, 2018, on file with author ("Tech giants' monopoly positions and entry threats [are] like beacon of lights for developers. Innovative efforts then invested in bypass, preemption, resegmenting or entirely new products. Like patents, platforms monopolies indirectly coordinate innovation efforts").

4 See OECD, Rethinking Antitrust Tools for Multi-Sided Platforms, 2018, <http://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

5 FTC, Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

besides the three well-known cases of abuse of dominance involving Google,<sup>6</sup> the German Federal Cartel Office (“Bundeskartellamt”) is allegedly close to finalizing its inquiry into Facebook,<sup>7</sup> and Amazon is currently investigated by both the European Commission (“Commission”) and Bundeskartellamt for possible infringement of EU and German competition laws.

The broad range and sophistication of anticompetitive strategies that the investigated GAF allegedly deploy are challenging competition authorities to make extensive use of their powers, available tools, and other resources. This is clearly illustrated by the complementary investigations into Amazon’s practices presently conducted by the Commission and the Bundeskartellamt.

## II. THE EU PRELIMINARY INVESTIGATION

The EU is conducting a preliminary investigation into some of Amazon’s practices in its dual role of provider of intermediation services to merchants and of online retailer. For a whole range of products, Amazon directly competes with merchants making use of the Amazon Marketplace. When announcing the “very early days” of an EU investigation into Amazon practices, Commissioner Vestager made very clear that the question they were focusing on is related to data.<sup>8</sup> The Commission noticed already in the Final Report on the E-commerce Sector Inquiry that marketplaces were collecting data to improve business performance, such as to “analyse customer behaviour and demand (. . .), to prioritise features that may be more popular in a certain geolocation; optimise product listings and displays (. . .); improve marketing activity (. . .); and develop the service provided as well as their website.”<sup>9</sup> The Commissioner said that Amazon might have used data collected from merchants hosted on its platforms not only to legitimately improve its services but also “to make its own calculations as to the next big thing.”<sup>10</sup> Put differently, Amazon would use the retailer data that it collects to identify successful products sold by third party merchants and add them to its own offerings as online retailer.

Commissioner Vestager confirmed that formal requests for information (“RFIs”) were sent out to “market participants in order to understand this issue in full.” A version of the questionnaires become public.<sup>11</sup> It was apparently sent to merchants offering products on Amazon.de that Amazon itself, as a retailer, had been adding to its own offerings during the previous five years.<sup>12</sup> The Commission’s questions related to the type of products involved (per ASIN, i.e. Amazon Standard Identification Number), the period during which these products were offered on Amazon.de before Amazon started offering them itself, and whether, and if so when, the merchants stopped offering these same products on Amazon.de.

Merchants were also requested to provide further details on their relationship with Amazon while selling those products on Amazon.de, whether Amazon suspended the merchants’ offerings on the platform, and whether they knew if Amazon ever contacted the suppliers of the products sold by those merchants on the marketplace in order to sell them itself. Moreover, the Commission asked detailed questions about the impact that Amazon’s market entry had on the merchants’ business (possibly differentiated according to the product specifically affected), and in particular whether merchants continued offering the same products on Amazon.de.

If merchants continued selling them, the Commission asked whether merchants lowered the prices of these specific products in order to compete with Amazon, and how this impacted the overall distribution (also via other channels) of these and other products. A different set of questions related to whether the merchant knew if Amazon had begun selling (under a private label (“white label”)) a product that was identical

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6 European Commission, CASE AT.39740, *Google Search (Shopping)*, July 27, 2017, available at: [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf); EC, Statement by Commissioner Vestager on Commission decision to fine Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine, July 18, 2018. See also Simonetta Vezzoso, “Android and Forking Restrictions: On the Hidden Closedness of ‘Open,’” *Market and Competition Law Review*, Volume II, Issue 2, 2018, 17-46. The third investigation relates to Google’s AdSense, see EC, Antitrust: Commission takes further steps in investigations alleging Google’s comparison shopping and advertising-related practices breach EU rules, July 14, 2016.

7 Bundeskartellamt, “Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules,” March 2, 2016.

8 EC, Press Conference, September 19, 2018, Video available at <https://ec.europa.eu/avservices/video/player.cfm?ref=1160574&lg=INT&sublg=none>.

9 EC Commission Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, May 10, 2017 para 641, [http://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_swd\\_en.pdf](http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf).

10 *Supra* note 8.

11 Wortfilter.de, Amazon: EU Kommission untersucht mögliches wettbewerbswidriges Verhalten, September 19, 2018.

12 *Ibid.*, Question 9.

or very similar (and therefore in direct competition with) a product that the merchant had offered on the Amazon Marketplace. Finally, the Commission wanted to know which categories of data were most relevant to merchants when selling on Amazon.de (such as current and/or previous competitors' prices, average prices of certain products, information about customer searches (keywords and other search terms), customer ratings, seller ratings, competitors' terms of sale, their return rates, information related to their suppliers, criteria for placement in the "Amazon Buy Box," etc.), and the extent to which merchants had access to each of them.

The letter accompanying the RFI that became public didn't specify whether the Commission was pursuing the case under Article 101 and/or 102 TFEU, but mentioned explicitly that the core of the EU's concerns related to Amazon's dual position and, specifically, to Amazon's collection and use of data generated or collected on Amazon Marketplace in connection with third party transactions for its own online retail activities.

The EU's concerns, therefore, seem to point to an informational advantage that Amazon enjoys because of its dual role and that it exploits to boost its own sales as online retailer on the same platform that other merchants use, and by doing that Amazon outcompetes them. Merchants selling their products on Amazon Marketplace don't have the technical possibility to stop Amazon from using the transaction data that it collects for its own purposes as a direct competitor. From this perspective, the EU Amazon preliminary investigation bears some resemblance to the Commission's previous investigations into Google's behavior, in particular the firm's alleged use of competitors' original material taken from their websites, such as, for instance, user reviews, "sometimes against their explicit will,"<sup>13</sup> that has apparently revived in parallel to the three more advanced Google cases mentioned above.<sup>14</sup> Whereas the Google "scraping case" has an intellectual property dimension to it,<sup>15</sup> the Amazon case clearly relates to issues of data pertaining to its collection and control. Both have in common that the platform might benefit from investments made by other firms that use the platform's infrastructure for conducting their businesses, either in the direct creation of content (e.g. reviews) or in conducting "experiments" with products in order to identify consumers' demand.<sup>16</sup>

A recent Background Paper published by the Bundeskartellamt especially refers to possible competition policy issues raised by hybrid platforms, in particular regarding foreclosure.<sup>17</sup> It uses the example of a company operating a marketplace that acts as a reseller on the same platform and competes with merchants selling their products on the same marketplace. As a further problematic constellation, the paper mentions cases in which market participants are excluded, by contractual or technical means, from exploiting data that they were instrumental in generating, which could have a negative impact on competition and innovation.

### III. THE COMPLEMENTARY ABUSE PROCEEDING BY THE BUNDESKARTELLAMT

On November 29, 2018 the Bundeskartellamt announced the initiation of an abuse proceeding against Amazon to "examine its terms of business and practices towards sellers on its German marketplace amazon.de."<sup>18</sup> It is not the first time that the German competition authority has investigated Amazon's practices on the marketplace. In January 2013 the Bundeskartellamt conducted an online survey of 2,400 merchants selling their products on Amazon Marketplace focusing on the effects of a price parity clause. Amazon.de contractually prohibited merchants from selling products they offered on Amazon Marketplace cheaper on any other internet sales channel,<sup>19</sup> a practice that Amazon.de publicly ended in August 2013.<sup>20</sup>

In announcing the more recent investigation, Andreas Mundt, President of the Bundeskartellamt, underlines that "Amazon is the largest online retailer and operates by far the largest online marketplace in Germany. Many retailers and manufacturers depend on the reach of Amazon's

<sup>13</sup> EC, Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers, April 25, 2013.

<sup>14</sup> See Reuters, "Does Google harm local search rivals? EU antitrust regulators ask," November 30, 2018.

<sup>15</sup> See J. Almunia, "Intellectual property and competition policy," Speech delivered at the IP Summit 2013, December 9, 2013.

<sup>16</sup> Cfr. S. Vezzoso (2016). Competition policy in a world of big data, in F.X. Olleros FX M. and Zhegu M (Eds), Research Handbook on Digital Transformations. Edward Elgar, Cheltenham, 400, 413 ("While third parties bear the cost of discovering market niches in terms of innovative and interesting products, Amazon employs big data in order to target successful third party offerings so as to appropriate value from their discoveries and innovations. Contrary to a conventional supply chain, in fact, in a platform setting suppliers, rather than retailers, bear the costs of experimentation" reference omitted).

<sup>17</sup> Bundeskartellamt, Was kann und soll die kartellrechtliche Missbrauchsaufsicht?, Hintergrundpapier, October 4, 2018.

<sup>18</sup> Bundeskartellamt, "Bundeskartellamt initiates abuse proceeding against Amazon," November 29, 2018.

<sup>19</sup> Bundeskartellamt, "Bundeskartellamt surveys Amazon Marketplace sellers," February 20, 2013.

<sup>20</sup> Bundeskartellamt, "Amazon announces end to price parity," August 27, 2013.

Marketplace for their online sales. Amazon functions as a kind of “gatekeeper” for customers. Its double role as the largest retailer and largest marketplace has the potential to hinder other sellers on its platform.” He also points to the “many complaints” that the German authority has received as the trigger for the investigation. In a magazine interview published in October 2018, Chairman Mundt, while reiterating his office’s focus on e-commerce and the overall objective to keep access to markets open, mentioned that they were receiving many complaints about Amazon’s terms and conditions but were still reflecting on the most suitable approach to the issues raised.<sup>21</sup>

The November 2018 press release announcing the investigation refers explicitly to the questionnaires sent out by the Commission during the summer of 2018 to “several hundred German retailers,” and clarifies that the “Bundeskartellamt’s and the Commission’s proceedings supplement one another.” According to Article 11(6) of Regulation 1/2003, if the two authorities were investigating the same conduct, the initiation of formal infringement proceedings by the Commission against Amazon would have the immediate effect of depriving the Bundeskartellamt of its competence to further investigate. At any rate, the same provision states that “(i)f a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.”<sup>22</sup>

The press release further specifies that “(a) criterion for the relevance of this conduct under competition law is that Amazon holds a dominant position or that the sellers are dependent on Amazon. There are indications of both, in particular on a possible market for marketplace services to consumers.” Therefore, it seems, the Bundeskartellamt is investigating Amazon’s conduct both for possible abuse of dominant position on the market for B2C marketplace services for online sales and for abuse of relative market power under Section 20 GWB.<sup>23</sup> The latter is a specificity of German competition law and refers to the prohibition of exclusionary abuses of relative market power and superior market power *vis-à-vis* small and medium sized competitors. As noted in a recent study on the modernization of abuse control commissioned by the German Minister of Economics,<sup>24</sup> Section 20 GWB already provides for a lower intervention threshold than the provisions on the abuse of dominant position (Sections 18 & 19 GWB) and it can be useful in addressing some kinds of anti-competitive behavior in the digital sphere.<sup>25</sup> The authors of the German study also suggest making Section 20 GWB “an effective instrument for closing persisting gaps in controlling abusive behavior in view of the special challenges facing the digital economy” by lifting the current limitation of the intervention to the protection of small and medium-sized enterprises.<sup>26</sup>

This shows that the Bundeskartellamt’s abuse proceeding against Amazon is not limited to one specific practice, but rather targets a whole array of business and related practices from different competition policy angles. Specifically, the practices are the following: first, liability provisions to the disadvantage of sellers in combination with choice of law and jurisdiction clauses; second, rules on product reviews; third, the non-transparent termination and blocking of sellers’ accounts; fourth, withholding or delaying payments; fifth, clauses assigning rights to use the information material which a seller has to provide with regard to the products offered; finally, terms of trade on pan-European despatch.

As mentioned before, these practices could be addressed by the Bundeskartellamt both under abuse of dominance and abuse of relative market power provisions. As to the abuse of dominance, this could be both of the exclusionary and the exploitative kind. For instance, the second practice investigated by the German competition authority related to the rules on product reviews, could point to a possible exclusionary abuse similar to Google’s investigation into “scraping” practices mentioned above, while other practices of Amazon could be more of a data-related exploitative kind in line with the Bundeskartellamt’s still current abuse proceeding against Facebook.<sup>27</sup> The latter might show similarities in particular with what the Bundeskartellamt rather cryptically describes as “clauses assigning rights to use the information material which a seller has to provide with regard to the products offered.”

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21 Bundeskartellamt, “Hartes Verhandeln muss erlaubt bleiben,” October 12, 2018.

22 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

23 “Gesetz gegen Wettbewerbsbeschränkungen” = “Act against Restraints of Competition” (German Competition Law).

24 H. Schweitzer, J. Haucap, W. Kerber & R. Welker, “Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen,” Studie für das Bundesministerium für Wirtschaft und Energie, 2018 <https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.html>.

25 *Ibid.*, p. 47 ss.

26 H. Schweitzer, J. Haucap, W. Kerber & R. Welker, “Modernising the law on abuse of market power,” Executive Summary, 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3250742](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742), p.1. See also R. Podszun, “How to Reform the Law on Abusive Practices: The study that will serve as a basis for reform in Germany (and Europe?),” in: Competition Policy International, 2018, p. 3. <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/09/Europe-Column-September-2018-Full.pdf>.

27 *Supra* note 7.

## IV. CONCLUSION

The current phase of the digital economy might well resemble a jungle, or a rain forest, in which the big trees seem to grab most of the light. At a minimum, to avoid the use of axe and saw, the big trees should let through a sufficient amount of light. The challenge for competition authorities here is to have a clear understanding of what life on the ground needs to survive and flourish, and to apply the tools that are suitable for preserving a healthy environment. In this respect, the Amazon investigations could show the benefits of an integrated organic approach to ensure a sustainable ecosystem.



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