PART I

Digitalisation and the EU's Regulatory Response

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The Notion of Abuse

Cues from the Italian FBA Amazon *Case*

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1. Introduction

Over the course of 2020 to 2022, the Italian Competition Authority (ICA) frequently investigated and fined digital ecosystems for their anticompetitive conduct. Not only did it open several cases under consumer protection law,[1] but it also initiated four major cases under EU competition law. In particular, although it was obliged to close one of these cases because the European Commission had meanwhile opened a proceeding on the same issue,[2] the ICA ended the other three investigations with prohibition decisions and significant fines.[3] Among them, the *FBA Amazon* case stands out for, among other things, its *legal ambiguity*, which we will discuss here.

On the one hand, it is clear that the ICA condemned Amazon for making Prime and other Amazon services accessible exclusively to commercial customers who delivered their goods using Amazon's logistics service – called Fulfillment by Amazon (FBA) – in lieu of other independent logistics service providers. On the other hand, it is unclear how the ICA conceptualised such behaviour. It *explicitly* qualified Amazon's conduct as a case of 'self-preferencing', although it did not build this charge by meeting the liability conditions that the European General Court affirmed in *Google Shopping*.[4] At the same time, the Amazon

[1] ICA, 10-01-2018, *WhatsApp-clausole vessatorie*, 3/2018; 10-12-2020, *Amazon-Vendita online Emergenza sanitaria*, 49/2020; 9-2-2021, *Facebook-Raccolta Utilizzo dati degli utenti*, 8/2021; 7-9-2021, *I Cloud Apple/Clausole vessatorie*, in 38/2021; 9-11-2021, *I cloud*, 47/2021, 16-11-2021, *Google Drive-Sweep 2017*, 47/2021; 22-3-2022, *Google Drive-clausole vessatorie*, 13/2022.

[2] ICA, 12-10-2021, *Google nel mercato italiano del display advertising*, 43/2021.

[3] ICA, 27-4-2021, *Google/Compatibilità App Enel per Italia con sistema Android Auto*, 20/2021; 16-11-2021, *Vendita prodotti Apple e Beats su Amazon Market Place*, 47/2021; 31-11-2021, *FBA Amazon*, 49/2021.

[4] Case AT.39740 *Google Search (shopping)* (27 June 2017), confirmed Case T-612/17 *Google LLC and Alphabet Inc v European Commission* EU:T:2021:763.

decision is replete with words and expressions evoking a 'tying' case. First, the ICA frequently refers to the company's different product combinations as well as the idea that Amazon's business clients did not spontaneously choose such pairings. Second, the ICA used the adjective 'essential' to describe Prime and the other Amazon services, dealing with them *as if* they were essential facilities. Indeed, the remedy of making Prime and those services accessible on FRAND (fair, reasonable, and non-discriminatory) terms to anyone who meets certain quality requirements is reminiscent of the duty to share that is usually adopted in essential facility cases. Finally, there is room to argue that because it focused on the effects of the company's practice, the ICA overlooked the form that the practice took – and the class of exclusionary practices to which it could belong. The ICA determined that Amazon's conduct produced an exclusionary effect and was likely to worsen consumer welfare, not only in the Italian market for intermediation services on marketplaces (the primary, monopolised market), but also by reinforcing Amazon's market dominance generally for logistic services for e-commerce operators (the secondary market). Moreover, as Amazon could not put forward any business justification for such behaviour, the ICA concluded that the conduct did not lead to any efficiency gain or innovation capable of offsetting the anticompetitive effects.

From here – or, at least, *from the ICA's reluctance to pigeonhole Amazon's conduct into a single class of practices and write the decision accordingly* – a general theoretical question can be raised: if one believes – as we do – that the effects-based approach would be the most appropriate to assess monopolistic practices, why does it matter whether Amazon's conduct is a case of tying, a case of essential facility, or a case of self-preferencing? More explicitly, if a dominant firm is said to be abusing its power when its conduct is likely to exclude rivals in an anticompetitive way without producing any efficiency or innovation gain in return, why does the form of that conduct – or the class of practices to which such behaviour is said to belong – matter? Or should one believe that qualifying a practice as self-preferencing sorts things out, because such a qualification traces the conduct to a family of practices – discriminatory practices – that differs from that of exclusionary practices?

In this chapter we examine these issues in light of the idea that, under a true effects-based approach, practices that take different forms but that, in light of the specific circumstances of the case, are likely to produce the same effects, should have an equal chance of being considered abusive. More specifically, we ask whether, when faced with a practice attributable to a class of conduct such as tie-ins or refusals to deal, competition authorities and private plaintiffs can prove its illegality without satisfying the liability conditions traditionally associated with that class of conduct, but instead demonstrating that those practices are exclusionary and have produced – or could produce – more anticompetitive than pro-competitive effects.

In so doing, we do not intend to reiterate the well-established idea that the notion of abuse is open-ended, so there may be practices, such as AstraZeneca's

notorious conduct,[5] that are abusive even though they are included neither among those listed in Article 102 of the Treaty on the Functioning of the European Union (TFEU) nor among those typified by the European Commission and the European Union courts. Neither does this chapter emphasise the well-established notion that dominant firms can carry out specific harmful economic strategies through an array of (pricing and non-pricing) practices. Instead, in this chapter we argue that, among the EU Court requirements that make different classes of exclusionary conduct abusive, there are some that are necessary – the requirements that relate to the effects of these practices – and others that point to certain factual circumstances that can be substituted for other factual circumstances depending on the scenarios under consideration.

In the remainder of the chapter, section 2 briefly describes the facts of the *FBA Amazon* case. Section 3 highlights the passages of the decision in which the ICA gives Amazon's conduct different legal characterisations, and we analyse the effects of this approach and what makes it legitimate. In section 4 we then discuss and refute a first interpretative hypothesis that qualifying Amazon's conduct as self-preferencing is independent of any other possible qualification of Amazon's conduct as exclusionary and anticompetitive. In section 5 this is countered with the second interpretative hypothesis that the different classes of exclusionary conduct which the ICA identified in Amazon's behaviour – ie tying in, refusal to deal, and possibly self-preferencing – are autonomous legal characterisations independent of one another. We repudiates this conjecture, and finally in section 6 we focus on the interpretative hypothesis that indeed legitimises the *FBA Amazon* decision: the only legal characterisation that matters in considering exclusionary conduct abusive is the one based on its actual and potential effects. In section 7 the role that requirements such as coercion and essentiality should play if the notion of abuse were truly effects-based is analysed. Section 8 concludes.

2. The Facts

In December 2021, the ICA fined Amazon €1,128,596,146 for violating Article 102 TFEU – ie for abusing its dominant position in the Italian market for intermediation services on marketplaces (the primary, monopolised market).

First, the ICA found that Amazon used its power to push the sellers active on its platform (hereinafter, 'the sellers') to adopt its own logistics service, FBA, instead of the logistics services offered by competing e-commerce operators in the market (the secondary, competitive market). In particular, the ICA noted that Amazon nudged[6] sellers to opt for FBA by offering 'non-replicable features

[5] *Astra Zeneca/Novartis* Case No COMP/M.1806 (26 July 2000).
[6] *FBA Amazon* (n 3), para 701.

of its platform' conditional on the use of FBA and,[7] hence, not accessible to sellers that finally chose to use other logistic operators. These features were: (i) the use of the Prime label, which in turn allowed sellers both to participate in special events such as Black Friday, Cyber Monday, and Prime Day and to increase the likelihood of being selected for the Buy Box; and (ii) the possibility of avoiding the strict performance indicators that Amazon applied to monitor and punish the bad performance of sellers using logistic operators other than FBA. These features were deemed 'non-replicable'[8] because they were game changing: they could increase sellers' visibility on the platform and thus boost their sales (as well as Amazon's revenues).[9]

Second, the ICA found that such conduct produced two structural effects that affected the market performances of – and, thus, consumer welfare in – both the primary, monopolised market and the secondary, competitive market. Namely, Amazon leveraged its power in the primary market to: (i) exclude other logistics operators (even integrated ones) from the secondary market,[10] given that many sellers were induced to use FBA over other logistics operators; and (ii) exclude other online marketplaces from the primary market,[11] because the costs for sellers of multi-homing – that is, of having a different logistics operator like FBA for each marketplace other than Amazon – would be prohibitively high.[12] After swelling its presence in both markets, Amazon had then positioned itself to increase prices and decrease the quality, variety, and degree of innovation of its supply.[13] In other words, according to the ICA, underlying Amazon's strategy was a classic and straightforward theory of harm: using market power in the primary, monopolised market to strengthen its structural positions in both the primary and secondary markets and then worsen Amazon's offer (not only in terms of prices,[14] but also in relation to the other variables on which consumer welfare depends) without losing customers.

Third, according to the ICA, Amazon was not able to put forward any objective justification for its conduct: it was not successful in indicating the efficiencies resulting *from the link* between FBA and the above non-replicable features of its own platform.[15] Nor – and granted that this should not have been the point – was it capable of showing why FBA was the best logistics service among the many offered, or why services other than FBA were not good enough.[16] It is true that such a link could be justified by maintaining that it was necessary to protect the

[7] ibid, paras 68586.
[8] ibid, para 696.
[9] ibid, para 737.
[10] ibid, paras 728 and 810.
[11] ibid, 728, 841, and 848.
[12] ibid, paras 836–37.
[13] ibid, paras 805–06.
[14] ibid, para 811.
[15] ibid, paras 703 and 725–26.
[16] ibid, paras 720–22.

quality of the 'package-service' that Amazon offers to its end users (consumers), which is made of two 'component-services': the purchase of a given product on the platform and its quick and certain delivery. However, as the imposed behavioural remedies exemplify, linking the above features to FBA is not the least anticompetitive way to protect the quality of the package-service. Indeed, such a result could have been achieved by imposing objective quality standards on any seller that wanted to deliver its products purchased on www.amazon.it through a logistic services provider other than FBA.[17]

As mentioned, the chapter takes these facts as given and focuses on their legal characterisation to discuss why this should matter.

3. How Many Legal Characterisations were Found in Amazon's Practice?

Words matter. The terms and phrases that antitrust authorities use to characterise the conduct they scrutinise are crucial not only because they serve to explain the actions of the authorities and thus increase the transparency and accountability of their intervention, but also – and perhaps primarily –because they serve to establish the *model situation* on which the authorities challenge firms.

As is well-known, at least in civil law systems, legal norms are conceived as abstract facts – model situations, indeed – to which legislators associate one or more consequences according to the scheme 'if A, then B'.

Therefore, for the sake of legal certainty, precisely specifying the model situation in dispute achieves multiple crucial objectives. First, it serves to crystallise the facts that the authorities are required to prove in order to demonstrate the unlawfulness of the conduct under scrutiny, as well as the facts on which firms must focus in order to show the non-injurious nature of that conduct. Second, it allows us to understand whether the invoked legal norm can find application and thus whether the legal consequences it provides for can unfold. Finally, accurate identification of the model situation allows the reviewing court to check who among the authorities and firms has proved their theory, be it the theory of harm or a defence.

However, even a casual reader of the Italian *Amazon* decision would stumble upon three different ways of referring to Amazon's conduct as *exclusionary* and *anticompetitive*. Indeed, the decision's words and expressions would equally fit a tying case, an essential facility case, and a self-preferencing case. Consider, for example, that in, back-to-back sections, the ICA was able to state:

- '[Amazon's] abusive conduct consists in *having coupled* with FBA a set of features indispensable for the success of [the sellers] on the platform … In

[17] ibid, para 725.

this way, on its marketplace, Amazon *has artificially combined* two distinct services … in order to create *an illicit incentive* to purchase FBA, in the absence of alternative ways of accessing the same features and their benefits'.[18]

- 'The visibility and benefits associated with the set of features above identified *has essential nature* for the success of the seller's activity on www.amazon.it'.[19]
- 'Amazon has been able to exploit its *super-dominant* position among marketplaces to increase demand for its logistics service from third-party sellers at the expense of competing services in the secondary non-monopolized market. This allows the firm's conduct to qualify as *self-preferencing*.'[20]

Furthermore, the ICA remarked throughout that Amazon *discriminated* between two categories of commercial customers: those who employed FBA and those who did not. In particular, the ICA focused on the discriminatory nature of Amazon's conduct when it clarified that 'Amazon operates its marketplace *without providing a system* for evaluating the logistics services on *clear, ex ante defined and non-discriminatory standards*'[21] and when – while addressing Amazon's self-preferencing – it stated that 'in the absence of a valid objective justification, *the difference in treatment* between the logistics service provided by the dominant firm and competing services that might be equally efficient constitutes, as confirmed by the ruling in the *Google Search (Shopping)* case, a practice unrelated to merit-based competition and therefore constitutes a violation of Article 102 TFEU'.[22] Emblematically, even at the very beginning of the decision, the ICA seemed to classify self-preferencing as a discriminatory practice by noting that Amazon's conduct is rooted in 'Amazon's ability to discriminate on the basis of whether or not Amazon's marketplace sellers subscribe to its FBA logistics service ("self-preferencing")'.[23]

Finally, as mentioned in section 2, the ICA focused on the effects of Amazon's conduct to show that it was *abusive* because it was exclusionary in both markets, capable of worsening consumer welfare there, and unable either to produce efficiency gains and innovation or to have any objective justification.[24]

However the *FBA Amazon* decision stands out for its abundance of qualifying words that do not make it clear what model situation the ICA actually held against Amazon. In other words, how did Amazon violate Article 102? To answer this question, a first hypothesis must be investigated: that Amazon violated Article 102 because it engaged in self-preferencing, understood as a discriminatory practice different from exploitative and exclusionary abuses.

[18] ibid, paras 713 and 824 (emphasis added).
[19] ibid, paras 714 and 715 (emphasis added).
[20] ibid, para 716 (emphasis added).
[21] ibid, para 718 (emphasis added).
[22] ibid, para 723 (emphasis added).
[23] ibid, para 3.
[24] ibid, paras 801–48.

4. Is Self-preferencing an Autonomous Model Situation?

As is well-known, the model situation included in Article 102 consists of two elements: the dominant position of the investigated firm – the structural element – and the abusive conduct of that firm – the behavioural element.

It is well-established in literature and case law that that Article 102 prohibits two different *families* of conduct:[25] exploitative and exclusionary abuses. Therefore, nobody has ever surmised that the conditions under which a practice is exploitative are equivalent (or fungible) to the conditions under which a practice is exclusionary and anticompetitive – exploitative and exclusionary practices have long been viewed as *two autonomous legal characterisations, independent one of another*, although a same practice may be exploitative and exclusionary at the same time.[26] Due to this classification, scholars have also deemed discriminatory practices to be a subset of either exploitative practices or exclusionary practices.

However, the advent of the digital economy, the uproar raised by self-preferencing cases,[27] and the fact that they may be framed as discriminatory practices,[28] as the ICA somehow did in the *FBA Amazon* case, leads one to wonder whether the notion of abuse is not indeed tripartite – ie whether discriminatory practices should represent *a stand-alone legal characterisation* different from those of exploitative and exclusionary practices. In other words, one could wonder if the model situation corresponding to discriminatory practices should be kept separate from the distinctive model situations applying to exploitative and exclusionary practices.[29]

[25] G Monti, 'The General Court's Google Shopping Judgment and the Scope of Article 102 TFEU', papers.ssrn.com/sol3/papers.cfm?abstract_id=3963336.

[26] A Jones and B Sufrin, *EU Competition Law* (OUP 2009) 364.

[27] P Ibanez Colomo, 'Self-preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43 *World Comp* 417; P Bougette, O Budzinski and F Marty, *Self-preferencing and Competitive Damages: A Focus on Exploitative Abuses* (2022) Gredeg WE No 2022-01; E Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102 TFEU' (2021) 6 *European Papers* 3; I Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 *Yearbook of European Law* 452; L Hornkohl, 'Article 102 TFEU, Equal Treatment and Discrimination after Google Shopping' (2022) 13 *Journal of European Competition Law and Practice* 99; A Licastro, 'Il self-preferencing come illecito antitrust?' [2021] *Il diritto dell'economia* 401; A Portuese, *'Please, Help Yourself': Toward a Taxonomy of Self-preferencing*, Information Technology & Innovation Foundation, 25 October 2021.

[28] N Petit, 'Theories of Self-Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015) 1(3) *Competition Law & Policy Debate* 4. To be sure, scholars have also framed self-preferencing as: (i) a refusal to deal case – see P Ibanez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) *Journal of European Competition Law and Practice* 532; (ii) as a tying case – see E Iacobucci and F Ducci, 'The Google Search Case in Europe: Tying and the Single Monopoly Profit Theorem in Two-sided Markets' (2019) 47 *European Journal of Law and Economics* 15; and (iii) as a margin squeeze case – see F Bostoen, 'Online Platforms and Vertical Integration: The Return of Margin Squeeze?' (2018) 6(3) *Journal of Antitrust Enforcement* 355.

[29] See also, though before the advent of self-preferencing, R O' Donoghue and J Padilla, *The Law and Economics of Article 102 TFEU* (Hart Publishing 2013) 245.

We believe that the prohibition of exploitative and exclusionary practices exists to realise two different policy goals. Unfair prices and trading conditions, which directly harm consumers and the counterparties of dominant firms, are forbidden so as to advance *fairness* and an *equal distribution of wealth*. Exclusionary practices, on the other hand, which harm rivals and, in so doing, consumers and their welfare/well-being, are forbidden so as to protect the competitive structure of markets, because in market economies competitive markets are expected to produce economic growth and prosperity for the good of all, including consumers.[30] By the same token, we believe that if EU institutions wanted to ensure that dominant firms treat their commercial partners equally, discriminatory practices would be prosecuted as stand-alone infringements, precisely because they impose different conditions on those partners' equivalent transactions. If this were the case, ensuring *equal treatment* would indeed be an autonomous policy goal different from those underlying the prohibition of exploitative and exclusionary practices.

However, in dealing with a secondary-line injury case, the *MEO* judgment ruled out this option.[31] There, the Court of Justice made clear that not every dominant firm applying dissimilar conditions to equivalent transactions causes an injury that EU competition law must prevent.[32] Rather, to apply Article 102, competition authorities and private plaintiffs must demonstrate, on a case-by-case basis and in light of the relevant circumstances, that the dissimilar conditions applied to equivalent transactions caused a competitive disadvantage.[33] True, in *MEO*, the Court did not explain what constitutes a competitive disadvantage. In particular, it did not classify discriminatory practices as exclusionary conduct: it did not state that the competitive disadvantage must consist in exclusion, although a discriminatory behaviour that affects the competitive structure of the market and produces overwhelming anticompetitive effects clearly causes a competitive disadvantage that EU competition law must prosecute.[34] However, in *MEO* the Court clearly stated that a dominant firm – even a dominant firm that is not vertically integrated – does not violate Article 102 if the different treatment that it imposes on its customers and suppliers does not put them at a competitive disadvantage.

Conversely, in the most recent *Google Shopping* ruling, the General Court held that dominant firms must obey the general principle of equal treatment.[35] Nevertheless, the Court also established that Article 102 TFEU applies to self-preferencing only if the conduct at hand is capable of producing exclusionary

[30] Case C-377/20 *Servizio Elettrico Nazionale* (*SEN*) EU:C:2022:379.
[31] Case C-525/16 *MEO v Autoridade da Concorrência* EU:C:2018:270.
[32] ibid, para 25.
[33] ibid, para 37.
[34] G Colangelo, 'Antitrust Unchained? The Case against Self-preferencing and the Zeitgeist in EU Competition Law' (2022) ICLE Working Paper No 2022-09-22 (who, by reading *MEO* in light of *Intel* and its effects-based approach, fills the gap between discriminatory and exclusionary practices).
[35] *MEO* (n 31), para 160.

effects as well as a recognisable anticompetitive impact.[36] Hence, one could raise doubts about the internal consistency of *Google Shopping*: if the principle of equal treatment applies, why should competitive harm ever matter, and why should it consist in the harm specifically produced by exclusionary conduct that is anticompetitive? On the other hand, if this is the competitive harm that must be appreciated in order to apply Article 102, why should discriminatory practices – or, at the very least, self-preferencing practices – ever qualify as a separate family of abusive practice, distinct from and in addition to exclusionary and anticompetitive behaviour?

We believe that at present – ie in the absence of further rulings that would bring order to the matter – the argument that discriminatory conduct represents a third distinct case of abuse of dominance should be rejected. The self-preferencing hypothesis should represent only one of the different forms of exclusionary and anticompetitive practices that dominant firms may hold in order to alter the competitive structure of the market and, in so doing, harm consumers and their welfare.

Moreover – and for our point of interest here – we reject the first reconstructive hypothesis formulated above: we consider that, beyond the words used, in the *FBA Amazon* case the ICA did not charge Amazon with having engaged in merely discriminatory conduct and thereby evading the obligation of parity of treatment. Rather, we believe that the ICA alleged that Amazon violated Article 102 by engaging in exclusionary and anticompetitive conduct that, like all conduct qualifying in these terms, fits the profile of discrimination. Indeed, on closer inspection, all exclusionary behaviour – whether an exclusive contract, a tying practice, or a refusal to contract – implies differential treatment that, if the conduct examined is indeed capable of excluding discriminated rivals and reducing consumer welfare, results in a clear competitive disadvantage.

This conclusion, however, is only partial. Having established that discriminatory practices – or, at the very least, self-preferencing practices – are a kind of exclusionary and anticompetitive practice, we want to ask whether self-preferencing itself should not be considered a model situation in its own right and therefore distinct from those of tying practices and refusal to deal.

5. What would be the Effect if the Existing Classes of Exclusionary Conduct were Autonomous Model Situations?

If cases of tie-ins, refusals to deal, discrimination, and self-preferencing amounted to autonomous legal characterisations – ie to model situations independent of one another – the criteria which the Commission and the EU Courts have progressively

[36] ibid, paras 166 and 175.

established over time to ascertain the anticompetitive nature of such practices ought to be regarded as the requisite abstract components shaping the aforementioned scenarios encapsulated within Article 102. Consequently, these very criteria should also be recognised as the elements upon which both the Commission and private litigants must construct their respective contentions.

More expressly, consider that under the *Microsoft* ruling of the Court of First Instance, tie-ins are anticompetitive when: (i) the firm in question possesses a dominant position in the tying market; (ii) the tie exists between two separate products; (iii) consumers suffer coercion; (iv) there is a reasonable likelihood of foreclosure in the tied market; and (v) the dominant firm's conduct lacks objective justification.[37] Likewise, under *Oscar Bronner*, refusals to deal that prevent the emergence of new business relationships are anticompetitive when: (i) the claimed resource is essential; (ii) the refusal is likely to have a negative effect on competition; and (iii) the conduct does not have any objective justification.[38] Finally, in *Google Shopping*, the General Court established the company's self-preferencing behaviour as anticompetitive due to: (i) the universal vocation and openness of Google's search engine; (ii) the features of the Google's general results page, which *were deemed akin to* those of an essential facility; (iii) Google's super-dominant or ultra-dominant position, which enabled the firm to act as a gateway to the internet; (iv) a market characterised by very high barriers to entry; (v) the idea that Google's conduct was abnormal, rather than necessary and rational – in sum, it transgressed the scope of competition on the merits.[39]

If these classes of exclusionary practices amounted to different and autonomous model situations, the ICA would have had to trace Amazon's conduct back to *one* of those model situations and then satisfy the specific conditions (*and not others*) that make that class of conduct (*and not another one*) unlawful.

However, the ICA did not do so. Moreover, the ICA did not show that Amazon's commercial clients suffered coercion, which is one of the requirements of the tie-in model situation. The ICA showed that Amazon nudged its commercial clients to opt for FBA. However, being induced to decide (ie to use FBA for logistic services) does not mean losing the freedom to make another decision (ie to use FBA's rivals instead), as it is in cases of technological and contractual tying, in which it is technological incompatibility and a mandatory contractual clause that deprive consumers of the ability to choose alternative products to those tied.

Likewise, the ICA did not demonstrate that Prime and the other Amazon's services combined with FBA were 'essential' within the meaning of the essential facility doctrine. The ICA also did not show that there were 'technical, legal or even economic obstacles' that made it impossible, or even unreasonably difficult,

[37] Case T-201/04 *Microsoft Corp v Commission* EU:T:2007:289.

[38] Case C-7/97 *Oscar Bronner* EU:C:1998:569.

[39] Case T-612/17 *Google LLC, formerly Google Inc and Alphabet Inc. v European Commission* EU:T:2021:763.

to duplicate Prime or Amazon's other services.[40] The ICA proved that Amazon's commercial clients that had access to Prime and the company's other services saw their sales increase, because those platforms' features were game changers. However, demonstrating the (enormous) value of these resources is not the same as demonstrating that resources fungible to those of Amazon would not have been *economically viable* for Amazon's rivals that decided to undertake the same investments as Amazon.

Similarly, while the ICA did not verify that the facts of the *FBA Amazon* case met the requirements that the General Court set forth in *Google Shopping*, the Authority maintained that Amazon's conduct was nonetheless a case of self-preferencing because Amazon applied unequal and unjustified preferential treatment to use of its own services, pursuing a leveraging strategy and hence falling outside the scope of competition on the merits.[41]

In sum, the ICA did not set its decision by tracing Amazon's conduct back to one of the aforementioned classes of conduct and did not prove that all the conditions of unlawfulness specific to the 'chosen' class were met. One could therefore conclude that the ICA not only did not develop its reasoning in an orderly manner, but it also did not prove its case (!).

However, in one of the most significant passages of the *FBA Amazon* decision, the ICA wrote that 'the qualification of conduct as abusive does not depend on whether it falls within "a given classification", but on the identification of the substantive characters used to qualify the abusive nature of the conduct, which may vary according to the conduct under consideration and the specific circumstances of the case'.[42]

Indeed, in relation to exclusionary and anticompetitive practices, Article 102 admits a single model situation that is based on the effects that dominant firms' practices are capable of producing and that is alternative to the many model situations corresponding to the specific practices, such as tie-ins and refusals to deal, with which the case law is familiar.

6. The Effects-based Notion of Abuse as the Only Model Situation for Exclusionary and Anticompetitive Practices

Regarding the family of *exclusionary abuses*, the Court of Justice has maintained:

> It is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant

[40] *Oscar Bronner* (n 38), paras 44–46.
[41] ibid, paras 236, 504, 506, 716, 723, and 810.
[42] *FBA Amazon* (n 3), paras 711–12.

> position should remain on the market. Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.[43]

In other words, the Court of Justice is crystal clear that Article 102 is by no means intended to dis-incentivise the efficiency gains and the innovations that dominant firms may realise on the basis of their own merits, nor to ensure that less efficient competitors remain on the market.[44] As said earlier, Article 102 prohibits exclusionary practices because, by using their significant market power to harm the competitive structure of the market, dominant firms prevent the market from delivering beneficial results in terms of price, output, quality, variety, and innovation.

Therefore, unless antitrust decision-makers decide to prosecute a dominant firm for the exploitative nature of its practices, under Article 102 dominant firms are decidedly allowed to engage in practices that *do not exclude* rivals – as is the case, for example, when a firm signs one-year exclusive contract with a small distributor. Moreover, under Article 102, dominant firms can even adopt practices that exclude actual rivals, marginalise them in a niche of the relevant market, or prevent potential rivals from entering it, if these exclusionary effects are *not anticompetitive* – ie if they are the natural consequence of competition on the merits, as happens, for example, when a pricing practice leads to the exclusion of rivals that are not as efficient as the dominant firm. Finally, under Article 102, firms are even free to engage in practices that produce exclusionary and anticompetitive effects if indeed these practices can be objectively justified because they produce countervailing effects in terms of price, choice (also called 'variety'), quality, and innovation that benefit consumers.

Thus, the constituent elements of exclusionary and anticompetitive practices are three: (i) their likely exclusionary effects; (ii) their likely anticompetitive effects that are not offset by likely efficiency and innovation gains; and (iii) the absence of additional and different objective justifications for such practices. Specifically, while those who challenge the unlawful nature of the conduct at hand must prove its actual or potential exclusionary and anticompetitive effects, those who argue for the lawful nature of that conduct must prove the preponderance of its actual or potential pro-competitive effects and/or the occurrence of other objective justifications.

This confirms and exemplifies that under Article 102 the illegality of exclusionary and anticompetitive practices does not depend on the *form* these practices take,[45] but on their *effects* – even potential ones. In other words, when tracing

[43] Case C-413/414 P *Intel* EU:C:2017:632, paras 133–34.
[44] *SEN* (n 30), paras 84–86.
[45] ibid, para 72.

dominant firms' real-world exclusionary practices back to the normative hypothesis included in Article 102 – ie back to the notion of abuse – antitrust decision-makers should not focus on the form of the practices at hand, but on their impact on market structure, if any, and on the effects they produce on the five variables (price, output, quality, variety, innovation) on which consumer welfare depends. As a consequence, on the one hand, practices likely to produce the same exclusionary and anticompetitive effects should have the same chance (likelihood?) of prohibition, regardless of their different forms; on the other hand, practices having the same form but producing different effects should have a different chance of being prohibited on the basis of the (potential/actual) effects at hand.

Therefore, returning to the *FBA Amazon* case, one could argue that such an effects-based notion of abuse *is the only legal characterisation* that should matter *for exclusionary practices* and, hence, the only model situation to which antitrust decision-makers should adjudicate exclusionary conduct occurring in the real world. In other words, the relevant abstract elements composing the notion of abuse applicable to exclusionary conduct should be the effects that the legislator wants to avert by enforcing Article 102 – namely that dominant firms use their conduct to undermine the competitive structure of the market without producing any pro-competitive effect in return.

However, if this interpretation is correct – ie if the effects-based notion of abuse were the only model situation applicable to exclusionary conduct – one should ask what the role of the aforementioned classes of exclusionary conduct and the associated lists of conditions would be.

7. The Importance of Focusing on (Alternative) Facts Showing the Illegality of a Practice

More than 20 years ago, the ICA was required to assess an exchange of information that took place in the market for motor vehicle liability policies (RCA).[46] The exchanges among firms were private and frequent and involved the vast majority of the insurance companies active in the market. The information was related to personalised past and present pricing and was not accessible to consumers. However, the market for automobile liability insurance policies *was not an oligopoly*. As a result, it could have been concluded that the behaviour at hand was lawful, because it did not meet all the liability conditions hitherto developed by case law to discern the illegality of information exchanges. However, the ICA decided otherwise, pointing out that the market for motor vehicle liability policies *was highly regulated*. The ICA clarified that information exchanges that occur in oligopolistic markets risk being anticompetitive because they increase

[46] ICA, 28-7-00, *RC Auto*, in 30/2000.

transparency *in contexts that are already highly transparent in themselves*. Thus, if a market is made very transparent by regulation, the latter is a factual circumstance that can be considered, *in place of* the number of competitors, to conclude that the information exchange in question increases transparency *in a context that is already itself very transparent*.

From a theoretical point of view, the ICA did not consider the oligopolistic market structure a condition of liability without which it would have failed to demonstrate the illegality of the information exchange. The ICA qualified the oligopolistic market structure as a factual circumstance from which possible anticompetitive effects could be inferred and which, consequently, could be replaced by another factual circumstance that would legitimise the same inference.

Likewise, the question arises whether it would be correct and possible to apply the same approach to the list of conditions – say also requirements – associated with exclusionary practices. Consider, for example, the conditions that make a tying practice unlawful. Beyond the circumstances of the firm's dominance and those peculiar to any exclusionary and anticompetitive practice – the exclusionary and anticompetitive effects in the absence of any objective justification – the case law hinges on the existence of a link between the two distinct products and on consumer coercion.

When verified, the first condition serves to exclude that: (i) tied products are not the equivalent of a right shoe and a left shoe – they do not correspond to two inseparable components of a single product; or (ii) the dominant firm's behaviour does not mark the advent of a new product capable of supplanting the goods that previously circulated separately from one another – as happened when, in the 1970s and 1980s, IBM assembled into a single machine several hardware components that until then were sold separately.[47] However, this consideration – or, more precisely, the amount of truth and accuracy this consideration contains – would not be lost by asking plaintiffs to merely focus on the exclusionary and anticompetitive effects of the dominant firm's practice. The above scenarios of the two inseparable products and of the revolutionary innovation should, however, be considered while discussing the objective justification of the practice and its prevailing pro-competitive effects.

As for consumer coercion, this factual element can also be absorbed into the discussion that takes place – and must always take place – while analysing the exclusionary and anticompetitive impact of the practices under consideration. More explicitly, the coercion of consumers – or, more generally, the coercion experienced by tie-in buyers – indicates that exclusion is highly likely because the individuals targeted by the tie-in product cannot choose the products of the dominant firm's competitors. However, depending on the scenario at hand, other factual

[47] *Transamerica Computer Company, Inc v IBM*, 698 F.2d 1377 (9th Cir 1983); *Memorex Corp v IBM*, 636 F.2d 1188 (9th Cir 1980); *California Computer Products, Inc and Century Data System, Inc, v IBM*, 613 F.2d 727 (9th Cir 1979).

elements – from super-dominance to cognitive biases[48] – may show that exclusion is equally very likely precisely because the individuals targeted by the tie-in product are prevented from choosing otherwise. In assessing bundle rebates, the Commission already accepts the occurrence of exclusionary effect *in the absence of a legal obligation* to choose the bundle *but in the presence of an economic incentive* to do so.[49] In other words, the Commission already accepts that the exclusion relevant to the application of Article 102 TFEU can arise not from a legal obligation but from another factual circumstance. As a result, it is unclear why consumer coercion should be the only factual circumstance relevant to finding tying abusive if one can show that such a practice is exclusionary, produces more anticompetitive than pro-competitive effects, and admits of no other objective justification.

A similar consideration should also take place with respect to the requirement of essentiality that needs to be verified in order to consider unlawful a refusal to deal that prevents the beginning of a new business relationship. With respect to this scenario, indeed, the essentiality requirement tells that exclusion will be highly probable precisely because rivals cannot carry out their business activities without access to the essential resource at hand. However, as *Google Shopping* shows, other factual circumstances can lead to the same conclusion.[50] In the (presumed) impossibility of demonstrating the essential nature of Google Search, the Commission nonetheless pointed out that other elements – ranging from the universal functionality of the search engine to the super-dominance of Google – made plausible the idea that Google's rivals interested in competing in secondary markets would have found it unreasonably difficult to vertically integrate upstream and substitute Google Search with their own search engines.[51]

Hence, we agree that the notion of self-preferencing was developed in relation to practices that could not qualify as tying or refusal to share essential resources.[52]

[48] CMA, 'Online Choice Architecture How digital design can harm competition and consumers' Discussion Paper (CMA 2022).

[49] 'Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C45/7, paras 47–62.

[50] Here we do not wish to deny that the requirement of essentiality was identified to defend both the dominant firm's freedom to contract and its property rights; nor do we wish to refute the idea that too easy a sharing of proprietary resources might reduce the incentives to innovate and compete for the dominant firm and its rivals. We take the view that, precisely because of what has just been said, the requirement of essentiality depends on the degree of exclusion – a very high degree of exclusion – that antitrust authorities are willing to tolerate before considering the dominant firm's refusal to deal as unlawful. What we want to argue in this chapter is that other factual circumstances, alternatives to the essentiality requirement, might nonetheless affect the degree of exclusion authorities are willing to tolerate before assessing as unlawful the conduct of the dominant firm, whatever form this conduct involving a proprietary resource takes.

[51] Undoubtedly, one might posit that the factors which the Commission employed in lieu of essentiality within the Google Shopping decision were inadequate substitutes for the latter. However, such an assertion does not inherently establish the invalidity of the intellectual process by which an actual circumstance is deliberated upon as a replacement for another.

[52] P Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law' (2016) 2 *Journal of Law, Technology and Policy* 301.

Nonetheless, we do not find that this way of proceeding should necessarily be considered a strategy that the Commission and national authorities should use to escape the strictness of the model situations provided for in Article 102, since we believe that Article 102 should include only two model situations: that of exploitative practices and that of exclusionary practices. In other words, the criticism that self-preferencing would be a contrivance can find acceptance to the extent that the existing types of exclusionary and anticompetitive conduct are considered autonomous legal characterisations and, consequently, to the extent that all the conditions attached to them are deemed strictly necessary for applying Article 102 TFEU. Otherwise, if what matters for prohibiting the exclusionary behaviours of dominant firms is only the actual and potential effects they produce, self-preferencing represents, on par with all other possible forms of exclusionary and anticompetitive practices, only one of the possible ways of describing behaviours that harm the competitive structure of the market and produce prevalent anticompetitive effects.

8. Concluding Remarks

In light of what has been written so far, one might wonder why we have chosen to engage in this discussion. Some might think that our intent is to demonstrate the merits of the *FBA Amazon* case. Others might believe that we prefer a loose application of Article 102 TFEU, especially in these times when big tech companies have become the preferred target of antitrust authorities and agencies.

None of this.

We are not animated by an attempt to save an otherwise shaky decision, because all decisions encompass light and shadow, and because even an unfounded decision would not cast doubt on the quality of an independent authority like the ICA. Nor do we want to take sides for or against digital giants, for two reasons: first, because we believe that preconceived positions against these companies are deeply unfair because these companies – like all others – can sometimes do good and sometimes bad; second, and above all, because the task of antitrust law is not to defend or attack a certain group of companies, but to evaluate from time to time the specific facts that have happened in a given scenario regardless of the company involved.

Internal consistency is instead the main reason that the different categories of exclusionary practices with which the case law is familiar should not be deemed proper legal qualifications. If Article 102 has to be interpreted in light of the effects-based approach, the differences among classes of exclusionary conduct should not exist.

After all, empirically speaking, Amazon's conduct is not the only example of monopolistic conduct that may fall under different, equally grounded categories of exclusionary behaviours, although, in practice, foreclosure of competitors and strengthening of dominant market power are the sole phenomena these practices generate in the market. Consider, for instance, the case of a multi-product

monopolist realising both a durable good and, in competition with third parties, its spare parts. Suppose it launches a new version of the durable product that is compatible only with an updated version of such spare parts, offered by the same dominant firm, and not with the previous versions of spare parts. Independent producers of those spare parts that are excluded from the after-market because of such incompatibility could try to attack the new version of the durable good by claiming that (i) the innovation is a sham, because its only *raison d'etre* is that of excluding dominant firms' competitors from the secondary market for spare parts; (ii) the new durable good consists in tech-tying, that deprives consumers of the freedom to choose the spare parts that should work with the durable good; and (iii) the new mechanical interface between the new durable good and its spare parts is an essential facility that the monopolist must share with its competitors in order to guarantee interoperability and their follow-on innovation.

In all three cases, the factual constitutive elements and the effects of the material practice at hand are the same. Thus, under a true effects-based approach aimed at identifying whether a certain conduct effectively deviates from 'normal' competition and is likely to undermine the competitive structure of the market, the chances of prohibiting the above three descriptions of the same conduct should be the same.

However, under the current case law, those three descriptions amount to three separate legal characterisations. Therefore, the liability conditions governing sham innovation, tech tie-ins, and refusals to deal are not the same, to the point that every attorney could order the three claims from the hardest to be met (sham innovation) to the easiest (tech-tying) to succeed.

Hence, as this example shows, the need to prove different liability conditions for each category of exclusionary practices undermines the goal of the effects-based approach implied – ie it avoids practices that materialise in the same way and have the same effects being subject to different assessments and thus having different probabilities of being prohibited.

Of course, some might observe that designating exclusionary and anticompetitive effects in the absence of objective justification as the only constituent elements of the abuse case applying to exclusionary and anticompetitive practices might detract from the certainty of the system. And this is because the presence of the aforementioned lists of conditions, which are different for each type of exclusionary conduct, would have the merit of limiting the discretionary power of antitrust authorities while ensuring that companies under investigation can effectively organise their defences. However, it should be noted that even a legal characterisation of the effects-based notion of abuse carries the burden of proving the aforementioned three constituent elements. Consequently, legal certainty would not be lost. More simply, then, antitrust authorities and firms should centre their investigations and defences on the factual circumstances that, from time to time, make exclusion and prevailing anticompetitive effects possible, while simultaneously precluding potential objective justifications.