

A Look At The Swath Of Claims Amazon Faces Worldwide

By **David Greene** (December 14, 2022)

The world tech giants are receiving much attention from competition regulators in many jurisdictions. As night follows day class action lawyers are not far behind.

Like some other tech companies, Amazon.com Inc. faces a swath of regulatory and class action claims in Europe and the U.S., including the latest class action to be filed in the U.K. by Julie Hunter acting as class representative in what has been termed the Buy Box claim.



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Do these actions spell radical change in the workings of Amazon or just short-term adjustment in the startling growth of the e-commerce giant?

From its beginnings in Jeff Bezos' garage in 1994, Amazon has grown to be one of the most influential economic and cultural forces in the world. In the past 10 years worldwide sales have grown from \$7 billion to \$470 billion, of which some \$32 billion are in the U.K.

In the U.S., Amazon has some 46% of the e-commerce market and in the U.K. it is 34%, with 90% of U.K. shoppers using it for some of their shopping.

While Amazon may not yet fulfill the European description of super dominant applied to Google LLC, which holds between 75% in the U.S. to 94% in India of domestic desktop search traffic market, it has become dominant enough to grab the attention of regulators in Europe and the U.S.

In 2017, Amazon resolved an investigation by the European Commission into its distribution deals with European e-book publishers, leading the commission to end its investigation without issuing a fine.

In 2019, the commission opened a formal investigation to assess whether Amazon's use of nonpublic data from independent retailers selling in its marketplace breached EU competition rules.

In that investigation in November 2020, the commission issued a statement of objections outlining its preliminary view that Amazon should not rely on independent sellers' business data to calibrate its own retail decisions when acting as a competitor to those independent sellers, because the practice distorts fair competition on its platform and prevents effective competition.

At the same time, the commission opened a second investigation into Amazon's buy box facility, and Amazon's Prime program.

The commission has the power to fine Amazon up to 10% of its global turnover if found guilty of breaching EU rules.

One of the purposes of a statement of objections is to set out the grounds for a resolution of concerns. Last month, the commission indicated that it will resolve the investigations on the basis of undertakings to be given by Amazon to:

- Cease using sellers' data for its own competing retail business and its private label products;

- Treat sellers equally when ranking their offers for the buy box on its website that generates the bulk of its sales; and
- Ensure that sellers and offers on its Prime program are chosen based on nondiscriminatory criteria, with sellers also allowed to choose their own logistics and delivery services company instead of Amazon's competing logistics services.

Domestic regulators have also been considering Amazon's sales practices. In the EU, that step is taken in coordination with the commission to ensure consistency across the EU.

In Italy, Amazon was fined by the Italian competition authority in 2021 for pressing its own logistic service — fulfillment by Amazon — for vendors through the ascription of the Amazon Prime label.

The Federal Cartel Office in Germany has been investigating Amazon for some years. The result of the early investigations was a resolution of sorts in 2019, and they led in part to the introduction of new legislation that reflects the new EU Digital Markets Act and seeks to widen the oversight and regulation of tech giants such as Amazon.

The German legislation prohibits self-preferencing, denying interoperability and exclusively bundling their own services to the detriment of rival offerings, among other prohibitions listed in Section 19b of the 10th Amendment to the German Competition Act, commonly known as the GWB Digitalisation Act.

Not being satisfied with the earlier resolution the German authority has opened up fresh investigations under the new legislation as to Amazon's conduct and algorithms.

In the U.K. the Competition and Markets Authority has started its own investigation. This is somewhat behind the European curve with the CMA yet to determine Amazon as dominant. Only on that finding can it then move on to investigate whether any dominance is being abused.

The European regulators' stance reflects the coming new regulatory regime for digital gatekeepers, the providers of the core platform services on which businesses depend to reach their customers. The new regime is reflected in the U.K. Digital Services Act, which came into effect on Nov. 1, and the EU Digital Services Act, coming into effect in May 2023.

In the U.S., Amazon has been under investigation by both state and federal investigators for some time. Here allegations will be litigated either by state or federal authorities. The latest filing against Amazon is by the California state attorney general alleging breach of state antitrust legislation.

Where the regulators tread, litigation is bound to follow, much these days on a class basis. In the U.S. a massive would-be class action was commenced in 2020 in Seattle. That recently survived an application to strike out when the court found that the class representatives had standing to sue and that they "sufficiently allege the requisite anti-competitive conduct."

As one might expect, Amazon denies wrongdoing on its part and says that its offering is not anti-competitive and serves the public well. It certainly does not roll over, and it strenuously litigates allegations with some success.

A claim accusing Amazon of anti-competitive behavior by preventing third-party sellers from offering lower prices for their products on other platforms, including their own websites in Washington, D.C., by the D.C. attorney general, was recently dismissed by the D.C. Superior Court. The dismissal was made upon Amazon's application, because the court concluded the plaintiff had failed to evidence sufficiently anti-competitive behavior.

In the U.K., a tentative class action has been commenced in the Competition Appeal Tribunal by a consumer advocate, Julie Hunter, seeking to be the class representative of all consumers in the U.K. who purchase goods on Amazon. Similar to the European claims and the inquiry by the CMA, the complaint centers round the buy box on the Amazon website.

The complaint suggests that consumers are given a choice that is manipulated in favor of Amazon to the exclusion of other vendors, who may be offering the same product cheaper or on better terms.

It is claimed thereby that customers are enticed to pay more than they need to and are more restricted in choice. The claim for unlawful abuse of dominant position is based on Section 18 of the Competition Act 1998 and Article 102 of the Treaty on the Functioning of the EU.

The claim raises many factual and technical issues on the way in which the buy box is designed, both physically on the page as the interface with the consumer and technically through algorithms.

The claim suggests that for its own commercial purposes, Amazon may exploit human biases on where we focus attention first, not just in positioning but also in color and font size. As a result, one element of expertise the court may require is evidence from behavioral scientists.

The claim is what is termed a stand-alone action. By Section 58A of the Competition Act, as amended by the Enterprise Act 2002, the U.K. Competition Appeal Tribunal is bound by decisions of regulators of breaches of the Competition Act or the relevant articles of the Treaty on the Functioning of the EU, at least until the U.K. left the EU.

Damages claims that are filed after such a finding are termed follow-on actions. If there has been no finding, the claimant must prove the breach in a termed stand-alone action. If a claim is started before a regulatory decision but one is subsequently made, a stand-alone action might be converted into a follow-on claim.

The claim by Hunter is brought under Section 47B of the Competition Act 1998, as amended by the Consumer Rights Act 2015. This section allows for collective actions either on an opt-in or opt-out basis. It matters not whether the claim is a stand-alone or follow-on claim.

We can foresee each stage of the collective process being heavily litigated on both sides. The class representative will need to secure certification of the class in a collective proceedings order and the claim on an opt-out basis. In this fashion Hunter will be seeking to represent all consumers who it is said have been affected by the alleged unlawful abuse.

Following the guidance given by the U.K. Supreme Court in *Merricks v. MasterCard* in

2020,[1] a follow-on action, the process of securing a collective proceedings order is undoubtedly easier, and recent decisions by the Competition Appeal Tribunal have been positive for claimants seeking collective proceedings orders. But there remain hurdles and no doubt these will be furiously fought.

We have yet to see consumer cases following the granting of a collective proceedings order resolved either by settlement or trial. This is an area of the law in development. In addition to questions of dominance and whether or not conduct is abusive, the major question will be whether and to what extent consumers suffer loss as a result of Amazon's practices.

In all competition litigation this is a hard-fought area with economists and econometricists taking center stage. It seems likely that the headline figure of a claim for £1 billion (\$1.24 billion) will substantially reduce in any resolution.

Are the U.K. proceedings of significance to the future of Amazon? Certainly not. With an annual turnover of \$470 billion, the proceedings in the U.K. are but a small issue. It is likely, however, that Amazon will fight the issues hard to avoid setting any precedents under current or future legislation.

Of more concern to the tech giant is European regulation and ensuring Amazon's trading practices do not fall foul of the impending EU Data Services Act and any separate U.K. legislation, and what may follow. Whether, as intended, the opening up of competition has a long-term commercial effect on Amazon remains to be seen.

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[1] [2020] UKSC 51.