

EU Commission's Consultations for Regulation of Digital Platforms (DSA/NCT):

Accounting for Workers' Rights When Regulating Amazon & Other Giants

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Representing more than 20 million workers around the world, and 7 million workers in Europe, UNI Global Union and European trade-union federation UNI Europa, hereinafter referred to as UNI, would like to comment on the consultation for an *ex ante* regulation of online platforms acting as gatekeepers. We will focus on outlining the detrimental effects that the current unregulated environment has had on society in general, and workers in particular. We will use the example of Amazon to illustrate this point, and propose concrete measures to tame Amazon's market power, in particular in relation to its dominant online marketplace.

While submitted in the narrow context of the current consultations for the *ex ante* regulation of digital gatekeepers within the framework of the Digital Services Act ("DSA") and for a separate new competition tool addressing structural challenges ("NCT"), we will also use the opportunity to point out regulatory aspects that could be added to the current agenda.

1 Introduction and Executive Summary

Today, we are facing an unprecedented opportunity to regulate dominant online platforms more vigorously. After years of underenforcement or inefficient application of existing competition laws, the combined and massively exploited market power of a small number of overly dominant gatekeepers has resulted in a global awakening. Such gatekeepers are commonly referred to as "**GAF**A" (Google, Amazon, Facebook and Apple). Based on the (empty) promise that greater size results in greater "efficiencies" for consumers and economic welfare, the rise of such companies has in reality benefited only the few.

One of the current legislative attempts to tackle exploitation of market power more efficiently and to address the underlying structural competition problems is the European

Commission's comprehensive "three-pillar approach" announced in early June 2020.¹ UNI supports the Commission's interim conclusions on structural competition problems and failing markets, which underpin the ongoing policy debate at the EU level.²

As a union that represents more than 20 million workers including 7 million in Europe, and organises the global service sector workforce at a time when work is precarious like never before, currently our core concerns relate to Amazon. There have been and continue to be numerous investigations into Amazon's market conduct around the globe, for a variety of reasons. Such investigations revealed not least that all players along the e-commerce value chain are dependent on the mercy of Amazon. Such players are notably "**Vendors**"³ and "**Sellers**"⁴, together referred to hereinafter as "**Suppliers**", and logistics partners, including self-employed persons that UNI believes are misclassified. Aggressive business practices of Amazon place vertical and horizontal constraints on such players as well as on (other) competing retailers and service providers (both online and brick-and-mortar). Yet, Amazon's sheer size and market power are a concern for competition in and of themselves.

Up until now, the focus of legislative initiatives has been too narrow, because such initiatives solely consider consumer-oriented economic goals. They do not take into account more basic democratic values and overall social goals. Regulatory scrutiny should not be strictly limited to competition matters. So far, Amazon has not used its power as a force for social good – it has avoided taxes⁵, squeezed small and medium-sized businesses (as well

¹ See *Commission*, press releases of 2 June 2020, "Antitrust: Commission consults stakeholders on a possible new competition tool" (IP/20/977) and "Commission launches consultation to seek views on Digital Services Act package" (IP/20/962).

² Our considerations are equally valid for similar initiatives undertaken by Member States of the European Union at the national level (such as Germany or France) or for discussions regarding stronger antitrust enforcement such as those conducted in the United States.

³ Given **Amazon's hybrid business model as both retailer and merchant platform**, there are several ways products can be sold on Amazon. It follows that there are different kind of supply relationships. In simple terms, the difference in such supply relationships is the following: "**Vendors**" are wholesale suppliers to Amazon (first-party sellers who supply products which are rebranded as "Sold by Amazon"). Thus, control over the products is ceded to Amazon. Vendors profit from the wholesale of products directly to Amazon and thus depend on further purchase orders by Amazon.

⁴ "**Sellers**" are third-party merchants who offer their own products on the Amazon Marketplace in retail competition with Amazon's own products. Sellers maintain control over their products, pricing and promotions and are the merchant of record when selling to consumers. Thus, their profit depends on individual sales. In addition, Sellers can choose between "Fulfillment by Amazon" (against additional remuneration for the use of Amazon's warehousing and logistics services) or organising fulfilment themselves ("Fulfillment by Merchant").

⁵ See *Fair Tax Mark*, The Silicon Six and their \$100 billion global tax gap, December 2019, <https://fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf>. Fair Tax Mark summarises: "Amazon stands out as the business with the poorest tax conduct, having paid just \$3.4bn in income taxes this decade. The cash tax paid was 12.7% of profit over the decade, at a time when the federal headline rate of tax in the United states was 35% for seven of the eight years under examination."

as global logistics companies), dumped prices, and dragged down labour conditions. This gives rise to a rather pessimistic outlook as to whether Amazon will act with social responsibility in the future. Therefore, UNI wishes to highlight the need to consider the impact of Amazon's business conduct on social achievements that have been hard-fought for decades.

The most common rationale underlying regulatory intervention could be market failure. However, that regulatory intervention is also based on further considerations is nothing new. Rather, the existing legal framework, notably Articles 151 and 153 of the Treaty on the Functioning of the European Union ("TFEU"), *requires* that, where possible, account is taken of all the Union's (social) policy goals.⁶ Under these circumstances, UNI proposes the consideration of additional regulatory rationales as justification for a more suitable and fine-tuned regulatory intervention, notably the protection of the rights of workers and the maintenance of social solidarity.

This paper summarises some of the apparent ways in which Amazon not only foreclosed competition or exploit vertical dependency, but directly or indirectly harmed the basis of any business – its workforce. Amazon is known for its exceptionally low profit margins, particularly in its European ecommerce business, which has consistently lost money.⁷ Forgoing profit for the sake of growth, Amazon invests nearly all funds right back into its business in the form of capital expenses, thus keeping profit and free cash flows artificially low. It is likely that investors are even fuelling Amazon's aggressive expansion strategy. Self-regulation of the market fails where "deep pocket" investors constantly support (and fund) such an excessive business model, and where such expansion even results in tax benefits.⁸

Amazon's monopsony is an important issue as well, as it is leading to destructive competition on the back of workers. Horizontal and vertical restraints and the mere size of the Amazon conglomerate reduce profit margins of competing retailers, suppliers, and logistics companies. It seems reasonable to suppose that this is reducing such actors' freedom to play fair in the social realm. Moreover, there is actual evidence that, in their efforts to keep up with unfair competition by Amazon, such actors are left without any choice but to reduce overall working conditions and suppress wages. Former employees of businesses squeezed out of the market by Amazon often do not find new skilled positions. "Lower-value" jobs in

⁶ In line with Articles 151 and 153 TFEU and considering fundamental social rights such as those set out in the European Social Charter as well as in the Community Charter of the Fundamental Social Rights of Workers, the European Union has as its objective the promotion of employment, improved working conditions and the social protection of workers.

⁷ Whereas average profit margins of Facebook, Microsoft, Apple and Google range from 27.3% to 44.1% between 2010 and 2019, Amazon's average profit margin during that period amounts to only 2.8%. Such calculations (profit/revenue (in %)) are based on profit and revenues figures provided by Fair Tax Mark (fn. 5), p. 10. & See: Shannon Liao, "Amazon is wildly profitable but it's still taking huge losses overseas," *The Verge*, April 26, 2018.

⁸ Fair Tax Mark describes the competitive advantage related to such strategy as follows: "*The company is growing its market domination across the globe on the back of revenues that are largely untaxed, and can unfairly undercut local businesses that take a more responsible approach.*", see Fair Tax Mark (fn. 5), p. 6.

warehousing or logistics as well as “gig economy” self-employed jobs replace better paid permanent jobs in secure working environments. To make matters worse, such new jobs create even more challenges and dependencies – in particular because they are yet again provided through (dominant) online platforms.

The bottom line is that Amazon’s unchecked growth is a vicious circle which makes life more difficult for the people while benefitting only a few. Such developments warrant immediate regulatory intervention.

Structural Concerns/ Systemic Challenges

- Sheer size and conglomerate business structure
- Aggressive growth/ expansion strategy
- Cross-subsidisation capability
- Deep vertical integration in all directions
- “Killer acquisitions”

Anti-Competitive Conduct

- Predatory pricing
- Self-preferencing of own products or services
- Tying/ bundling of additional services
- Exploitation of data
- Demanding unjustified benefits
- Price parity clauses

Effect on Freedom to Compete/ Foreclosure

- Monopsony/ buying power
- Total dependence of entire industries
- Industrywide lowering of profit margins
- Destructive competition/ dumping
- Market concentration

Spillover Effects on Workers’ Rights

- Lowering of working conditions (e.g. workplace safety)
- Wage suppression
- Alignment of precarious employment conditions

2 Recommendations

Based on our findings, UNI submits that the current structural and systemic challenges warrant regulatory intervention through the following measures:

- **Regulating Amazon in particular:** With a view to Amazon in particular, in addition to the obligations listed below, the regulation should enable the following:
 - **Structural separation:** Allow for a structural separation of its different business divisions. This would (i) increase transparency as regards cash flow within the corporation, (ii) disincentivise any form of self-preferencing or tying and (iii) prevent predatory pricing as well as any form of unfair cross-subsidisation. It is the best way to efficiently control the otherwise inherent conflict of interest.
 - **Ban on exploitation:** Vigorously monitor and prevent Amazon from, directly or indirectly, demanding unjustified benefits vis-à-vis dependent sellers, with means such as rebates, procurement of extra services (ads, logistics) as a condition to access the marketplace or as criterion for their ranking.
 - **Ban on AI-based predatory pricing via third-party data:** Prohibit the use of data gathered via Amazon's marketplace activities on the success/pricing of products for Amazon's own offerings.
- **Identifying SMP-platforms:** The European Commission should introduce an *ex ante* regulation of online platforms with significant market power ("SMP-platforms"). To identify such companies, the Commission should employ the methodology used in the telecoms sector. Accordingly, the legislation should set out rules to (i) identify relevant platform (intermediation) services, (ii) define the corresponding markets, (iii) assess significant market power on those markets and (iv) analyse whether, due to consistently high barriers to entry and a the number of affected transactions, competition law alone will suffice or specific regulation of the SMP-platform is merited. Apparent markets with SMP-platforms in need of regulation include the following: general Internet search (Google Search), browsers (Google Chrome), mobile operating systems (Apple iOS, Alphabet Android), app stores (Apple App Store, Google Play), social networks (Facebook) and – last but not least – online marketplaces (Amazon).
- **Obliging SMP-platforms to comply with specific rules:** The identified SMP-platforms should be subject to a set of tailored *ex ante* obligations. Such obligations should be imposed either directly by legislation or, following the SMP-analysis, per decision of a specialised regulatory body on a case-by-case and obligation-by-obligation basis. On a general basis, the list of obligations should encompass, at least, the following obligations – for all SMP-platforms:
 - **No bundling of own services:** SMP-platforms shall not technically or commercially bundle other own services to their dominated platform. In particular, they shall not provide services that operated on a separate market directly on their dominant platform. Google's integrating of a job search service and Facebook's integration of a marketplace are just two obvious examples.

- **No preferencing of own services:** Similarly, SMP-platforms shall not use their intermediation service to directly or indirectly promote a separate own service by crawling, indexing, ranking or displaying it more favourably than competing services.
- **No preferencing of biased (paid) intermediation:** SMP-platforms shall be subject to a neutrality obligation that ensures that consumers receive a sufficiently unbiased service. This entails that, if a SMP-platforms offers both neutral (organic) and paid intermediation (for example, through advertising), it shall ensure a sufficient level of the former and must not present the paid intermediation more favourably.
- **Fair terms and conditions:** SMP-platforms shall be subject to strict fairness obligations. Their terms and conditions must be adequate, proportionate, transparent and non-discriminatory.
- **Access to essential data:** In order to allow competition with SMP-platforms to develop, SMP-platforms shall be obliged to grant access in real-time to such anonymised data that is essential to compete with them.
- **Interoperability:** To allow competition to develop, SMP-platforms shall be obliged to make their service interoperable with competing services, thereby dissolving any lock-in effects and neutralising the strong network effects that currently make them unassailable.
- **Taking workers' rights into account.** Overall, in the entire debate on the (*ex ante*) regulation of digital platforms and systemic challenges (DSA and NCT), the Commission should keep in mind that a specific regulation can and shall consider all policies of the EU. This includes the protection of workers' rights. Therefore, we would encourage the Commission to use the current legislative reform – as well as follow-up initiatives – to also promote fair working conditions and high employment levels as cornerstones of our society.

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3 The current legislative initiatives in the EU

On 2 June 2020, the European Commission announced its conclusion that “*ensuring the contestability and fair functioning of markets across the economy is likely to require a holistic and comprehensive approach*”.⁹ UNI fully agrees with this conclusion. The Commission outlined a three-pillar approach. In addition to the continued vigorous enforcement of the existing competition rules¹⁰, the Commission is exploring possible *ex ante* regulation of digital platforms and a possible new competition tool. UNI is convinced that the considerations outlined in this paper fit perfectly in such framework and complement the Commission’s market failure rationale for better targeted regulation.

Possible *ex ante* regulation of digital platforms. Within the framework of the Digital Services Act¹¹, the European Commission is exploring whether to include additional requirements for those digital platforms that play a “**gatekeeper role**”. Such requirements enable the maintenance of a level playing field in European digital markets. According to the Commission, “*a small number of large online platforms captures the biggest shares of the value*”.¹² This is due to their gatekeeper positions, strong network effects and/or control over entire platform ecosystems. Such characteristics make such platforms incontestable for existing players and new entrants. Gatekeeper platforms can leverage their advantages to facilitate their market entry or improve their services in adjacent markets. More generally, the Commission sees a risk that traditional businesses will become increasingly dependent on such large online platforms or that large-scale unfair trading practices emerge. The Commission is exploring whether it is justified in imposing additional general rules for all platforms of a certain scale and/or tailored regulatory obligations for specific gatekeepers. For example, certain “blacklisted” unfair trading practices could be prohibited under a new and flexible *ex ante* regulatory framework. In addition, tailor-made remedies could be adopted on a case-by-case basis where necessary and justified.

Possible new competition tool. In addition to the proposed gatekeeper regulation, the Commission proposes a “new competition tool”. Such tool would have the goal of dealing with “*structural competition problems across markets which cannot be tackled or addressed in the most effective manner on the basis of the current competition rules*”¹³. Thus, such a tool intends to close the gap between existing competition law and certain identified structural competition problems, thereby restoring undistorted competition in affected markets. Based

⁹ Commission, IP/20/977 (fn. 1).

¹⁰ These are Articles 101 and 102 TFEU. Article 101 prohibits cartels (that is, anti-competitive agreements and concerted practices between companies), whereas Article 102 prohibits the abuse of an undertaking’s dominant position in a given market.

¹¹ The Digital Services Act is a legislative package addressing various issues with regard to the provision of digital services within the EU’s internal market.

¹² Commission, Inception impact assessment, “Digital Services Act package: *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union’s internal market”, 2 June 2020, Ares(2020)2877647, p. 1.

¹³ Commission, IP/20/977 (fn. 1).

on its enforcement experience in various industries, the Commission identified two types of structural competition problems. First, “**structural risks for competition**”.¹⁴ Second, a “**structural lack of competition**”.¹⁵ The existence of such structural competition problems leading to inefficient market outcomes (such as “tipping” of the market or “winner-takes-most” scenarios) could make it necessary to impose behavioural or structural remedies without the finding of an actual infringement of existing competition rules. Conversely, no fines would be imposed.

4 UNI is particularly concerned with Amazon’s overwhelming dominance and exploitation thereof

Nearly all of the digital gatekeepers that are subject to the envisaged regulatory reforms have been linked with issues concerning workers’ rights. However, in this paper we would like to focus on Amazon as a particularly worrying example. Unfortunately, due to its commercial success, it serves as the (wrong) role model for others, and the legislators have the responsibility for clarifying that Amazon’s growth on the back of workers’ rights must not become the new market standard. The *ex ante* regulation of gatekeepers provides an opportunity to do so.

Amazon rapidly grew into a giant vertically integrated, conglomerate corporation spanning seemingly unrelated horizontal sectors. As such, it poses structural and systemic risks to the economy, society and democracy even in the absence of any specific conduct that would qualify as anti-competitive under the current EU competition law legislation. More particularly, Amazon’s unchecked growth and practices have led to a number of distortions of the competitive level playing field between Amazon and others. This concerns, for example, Amazon’s relationships vis-à-vis competing retailers, Suppliers (both Sellers and Vendors) and logistics partners. The competition concerns pertaining to Amazon result in high social costs.

A. Structural concerns: Largely unchecked, Amazon rapidly grew into a giant vertically integrated but at the same time conglomerate behemoth

Amazon CEO Jeff Bezos left Wall Street in 1994 to start Amazon.com, Inc. – an online bookstore. Today, the company is best known as the “**Everything Store**”, a place where consumers can buy nearly anything online. In January 2019, Amazon even surpassed

¹⁴ Market characteristics such as network and scale effects, a lack of multi-homing and lock-in effects can distort competition if they are exploited by companies. By means of early intervention, the Commission intends to prevent the emergence of powerful companies with an “entrenched market and/or gatekeeper position”. In addition, the Commission perceives a risk that non-dominant companies will attempt to monopolise a market through anti-competitive means.

¹⁵ Markets displaying systemic failures due their structure and certain characteristics (such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation) cannot deliver competitive outcomes. They are “failing markets”. Any such structural market failure must be addressed even in the absence of any anti-competitive conduct. In addition, the Commission sees a risk of tacit collusion in oligopolistic market structures.

Microsoft as the most valuable public company for a brief period. Amazon expanded its business by means of vertical integration and diversification. Some of its growth has been organic, while other growth has been due to acquisitions. Today, Amazon is one of the most powerful corporations on this planet.

Below are some examples of why the sheer size and overall corporate business strategy of Amazon give rise to structural competition concerns even in the absence of any specific anti-competitive conduct.

Acquisitions. The list of Amazon's acquisitions is long.¹⁶ Amazon has a diverse portfolio and has purchased or invested in companies from a wide variety of market sectors, including retail, consumer goods, publishing, media and technology.

One of the most noticeable corporate transactions of Amazon was the acquisition of Whole Foods Market, Inc. in 2017. Such acquisition is remarkable not only as it was Amazon's largest purchase to date (\$13.7 billion), but because up until that time, Amazon was rather perceived as the "destroyer" of traditional brick-and-mortar retailers. In addition, the takeover somehow exemplifies Amazon's overall strategy. While Amazon diversified its business ("offline" organic food retail), it gained access to a brick-and-mortar infrastructure, where it would soon offer Amazon customers lockers for deliveries from its online shop. Such lockers in turn brought more customers to the stores. Furthermore, such infrastructure allowed Amazon to increase its fresh food delivery activities (**Amazon Fresh**).

Diversification. Amazon has long been regarded with suspicion because of its dual role as both platform operator – controlling essential web and e-commerce infrastructure – and downstream service operator. Most significantly, this relates to Amazon's hybrid e-commerce platform **Amazon.com**, where Amazon offers a third-party sales platform for retailers ("**Amazon Marketplace**") and its own online retail operations. Operating both on an upstream intermediation market for businesses (Sellers) and downstream retail markets vis-à-vis its end customers ("shoppers") has created a strong conflict of interest for Amazon.

Amazon has a large digital media footprint as well. With **Kindle**, it is active as (the dominant) e-book platform, hardware manufacturer and publisher. With **Audible**, it is active in the audiobook and other market segments. With **Prime Video**, it started a video streaming platform, with **Amazon Music** a music streaming platform. Amazon even bought the live video-game-streaming site **Twitch**.

However, the most significant business operation apart from the sale of physical or digital goods is **Amazon Web Services ("AWS")**. AWS is a subsidiary of Amazon providing on-demand cloud computing services. It offers large-scale computing and storage capacity along with a variety of products and services, including a software marketplace. According to Amazon, it "*has the largest global infrastructure footprint of any cloud provider*".¹⁷ Amazon's AWS activities are important in the context of regulating Amazon for several reasons.

¹⁶ *Wikipedia* lists 102 acquisitions as of 31 July 2020, see https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Amazon.

¹⁷ See https://aws.amazon.com/about-aws/global-infrastructure/global_network/.

Most notably, AWS is Amazon's most profitable and fastest growing business segment. While net sales of AWS are rather small compared to Amazon's total net sales,¹⁸ it is the key area of growth for Amazon.¹⁹ Yet, even more importantly, it is the most profitable business unit, accounting for 59% of all operating income in 2018 and 63% in 2019 (despite large investments).²⁰ AWS serves as a source to subsidise Amazon's retail expansion, in particular its continuously loss-making international operations.²¹ With AWS, Amazon is by far the leader in the worldwide cloud infrastructure services market.²²

In addition, since AWS is the cloud infrastructure of the web, Amazon has direct access to large amounts of (meta) data. Rival services use AWS to provide their services. This means that Amazon can track their development very closely. Amazon can similarly track the development of potential targets for acquisitions. AWS is also used for providing its own services. All of Amazon's cloud-based digital media services, for example Amazon Prime Video and Amazon Music, are operated via AWS. Since rival services rely on the same infrastructure (e.g., Netflix), Amazon's dual role as both platform infrastructure and service provider becomes apparent yet again.

Vertical integration. Using AWS as digital and Whole Foods as physical local infrastructure are not the only examples of vertical integration²³ that benefit Amazon's activities. Amazon also operates its own fulfilment and delivery networks (**Amazon Logistics**)

¹⁸ Net sales of AWS represent only 11% in 2018 and 12.5% of total net sales in 2019.

¹⁹ AWS grew 47% in 2018 and 37% in 2019.

²⁰ See Amazon, Inc.'s 2019 Form 10-K, pp. 24-25.

²¹ In this regard, see also *Skorupa, J.* (Retail Info Systems), "Amazon's Secret Weapon: Cloud Subsidizes Retail", 28 April 2015, <https://risnews.com/amazons-secret-weapon-cloud-subsidizes-retail>: "Without the cloud services division, it is doubtful Amazon would have the resources and ability to maintain the heavy level of investment it continues to make in the retail division, which has never been profitable."

²² In 2019, 32.2% of the annual \$107.1 billion spent in worldwide cloud infrastructure went to Amazon. AWS's market share alone exceeded the share of the next three competing cloud services (Microsoft Azure (16.9%), Google Cloud (5.8%) and Alibaba Cloud (4.9%)), see *canalys*, "Cloud market share Q4 2019 and full-year 2019", 4 February 2020, https://www.canalys.com/static/press_release/2020/Canalys---Cloud-market-share-Q4-2019-and-full-year-2019.pdf. Such trend continued in Q1 and Q2 2020, see *canalys*, "Cloud spending surged in Q2 2020, as lockdowns drove high levels of consumption", 30 July 2020, <https://www.canalys.com/newsroom/worldwide-cloud-infrastructure-services-Q2-2020>.

²³ Vertical integration refers to the scenario where two or more successive production stages of a product or service (including its distribution) normally operated by separate companies are combined under the same control.

that it uses for its own goods along with those of Sellers that buy “**Fulfilment by Amazon**” services.²⁴ With **Amazon Pay**, Amazon offers a payment processing and checkout solution.²⁵

Amazon enables its rapid expansion through its own delivery infrastructure. Amazon does so through its own delivery subsidiaries, but also by subcontracting deliveries to contractors. Subcontractors provide such services even cheaper to Amazon and at the same time limit Amazon’s own overall liability. The so-called **Amazon Delivery Service Partner** programme is currently available in Europe in Germany, the UK and Spain.²⁶ Amazon offers such subcontractors all they need to start their service provision for Amazon – the leasing of delivery vehicles, Amazon-negotiated conditions for insurance policies and data services, Amazon-produced electronic handhelds for scanning the deliveries along with Amazon uniforms for delivery staff.²⁷ However, the labour conditions in such companies are reportedly highly challenging.²⁸

In addition, Amazon has also created its own system of “gig economy” self-employed persons. Its **Amazon Flex** programme was introduced in the US in 2015, and only recently in some EU countries as well. It is the next step in turning employees into mini entrepreneurs who work on their own account. They bear the entire operational risk. Amazon Flex deliverers must bear any expenses for their privately owned delivery vehicles and necessary insurance policies. Anyone with a driver’s licence can register via the Amazon Flex app as independent contractors performing deliveries. Payment is not based on hours worked, but on specific time slots for which drivers must apply on a “gig-to-gig basis”. Reportedly, such time slots are often calculated too tightly.²⁹ UNI believes that these workers are misclassified and should in fact be considered statutory employees.

In the UK (and earlier in the US), Amazon went so far as to directly compete with logistics companies for the end-to-end delivery of third-party, non-Amazon Marketplace shipments. **Amazon Shipping** is advertised as follows in the UK since June 2020: “*Amazon UK offers a premium shipping service at competitive prices. Amazon Shipping will pick up your parcels 7 days a week, and deliver them to your customers.*”³⁰

²⁴ See fn. 4 above.

²⁵ See <https://pay.amazon.com/>.

²⁶ See Amazon Logistics, Frequently asked questions, “Do you offer this program in other countries besides the United States?”, <https://logistics.amazon.com/marketing/faq>.

²⁷ See <https://logistics.amazon.de/marketing/opportunity>.

²⁸ In Germany, working days of up to 12 hours due to excessive route planning (180 stops per shift) were reported. See Thomasson, E./Alkousaa, R. (Reuters), “How will Amazon deliver in its second biggest market?”, 23 October 2019, <https://www.reuters.com/article/us-amazon-com-logistics/how-will-amazon-deliver-in-its-second-biggest-market-idUSKBN1X21D8>.

²⁹ Kramer, B/Frisse, J. (Zeit), “Flex und fertig”, 24 November 2017, <https://www.zeit.de/arbeit/2017-11/amazon-flex-arbeitsbedingungen-zusteller-bezahlung-tarif-lohn>.

³⁰ See <https://ship.amazon.co.uk/requestinfo>.

On the consumer-facing side of its business, Amazon is vertically integrated into the (possible) market for in-home, voice retail distribution with its smart speaker **Amazon Echo**, operating with its own “virtual assistant” **Amazon Alexa**. Consumers increasingly shop using its voice technology. For instance, this allows Amazon to favour its own products over those of Sellers.³¹

Such vertical integration allows Amazon to cherry-pick in the context of applicable sectoral **collective agreements** as well. For example, it can pretend to be a mere logistics company to avoid the higher collective wages in the retail sector in Germany.³²

Exceptionally low profit margin and poor tax conduct. Amazon is known for its exceptionally low profit margins.³³ Amazon forgoes profits for the sake of growth. Amazon invests nearly all funds right back into its business in the form of capital expenses, thus keeping profit and free cash flows artificially low. Leaving no doubt about the company’s strategy to focus entirely on market leadership, Jeff Bezos summarised this as early as 1997: “*It’s All About the Long Term*”.³⁴ According to Bezos, “[t]he stronger [Amazon’s] market leadership, the more powerful our economic model.”³⁵

This “honesty” right from the beginning created the unique ability for Amazon to adopt aggressive long-term pricing strategies and forego any profits, without having to fear punishment or countermeasures by investors who would expect dividends under normal circumstances. Rather, it is likely that investors are even fuelling Amazon’s aggressive expansion strategy. Self-regulation of the market fails where “deep pocket” investors constantly support (and fund) such an excessive business model, and where such expansion even results in tax benefits.³⁶

Data dominance. An additional advantage that Amazon enjoys is its deep customer knowledge and access to vast amounts of data extracted from its platform, in particular

³¹ According to researchers at Bain & Co., Amazon “*clearly positions its own private labels favorably in voice shopping*” to further steer consumers to its own brands. See Creswell, J. (New York Times), “How Amazon Steers Shoppers to Its Own Products”, 23 June 2018, <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>.

³² For seven years, trade unions in Germany have been fighting for recognition of the regional collective agreements for the retail and mail order industry (without success).

³³ Whereas average profit margins of Facebook, Microsoft, Apple and Google range from 27.3% to 44.1% between 2010 and 2019, Amazon’s average profit margin during that period amounts to only 2.8%. Such calculations (profit/revenue (in %)) are based on profit and revenues figures provided by Fair Tax Mark (fn. 5), p. 10.

³⁴ See Bezos, J. (Amazon.com, Inc.), “1997 Letter to Shareholders”.

³⁵ Id.

³⁶ Fair Tax Mark describes the competitive advantage related to such strategy as follows: “*The company is growing its market domination across the globe on the back of revenues that are largely untaxed, and can unfairly undercut local businesses that take a more responsible approach.*”, see Fair Tax Mark (fn. 5), p. 6.

product search related data. This allows Amazon to target customers (or discriminate in terms of prices) and to relieve it of the market exploration costs which competing retailers must bear.

Covid-19. The coronavirus disease outbreak in 2019-20 was the latest occurrence which provided Amazon with a strong competitive advantage. The New York Times summarised the Q1 2020 as follows: “*Buoyed by a pandemic-induced surge in online shopping, Amazon had \$88.9 billion in quarterly sales, up 40 percent from a year earlier. Profit doubled, to \$5.2 billion, even though the company invested in expanding warehouses and other ways to increase capacity.*”³⁷ UNI provided an in-depth analysis of Amazon’s conduct during that time, finding that Amazon’s actions were “*essentially irresponsible*” vis-à-vis its workforce and others, and that Amazon further strengthened its market position.³⁸

These are only some examples of Amazon’s advantages, business strategy and practices. While (parts of) these may not be anti-competitive in and of themselves, the market development and the competitive advantages outlined above have built an unassailable conglomerate. The e-commerce giant had been growing rapidly in terms of sales, footprint, headcount and stock price over years.³⁹ Amazon is now the largest online retailer on a global⁴⁰ as well as European level.⁴¹ Its dominance on several markets has been presumed in a number of previous competition investigations, and current investigations are based on the finding of dominance.⁴²

³⁷ Wakabayashi, D./Weise, K./Nicas, J./Isaac, M. (New York Times), “The Economy Is in Record Decline, but Not for the Tech Giants”, 30 July 2020, <https://www.nytimes.com/2020/07/30/technology/tech-company-earnings-amazon-apple-facebook-google.html>.

³⁸ See UNI, “Amazon & the Covid-19 Crisis. Essentially Irresponsible.”, 29 July 2020, <https://uniglobalunion.org/news/amazons-poor-social-performance-during-covid19-crisis-a-threat-new-uni-report>.

³⁹ See UNI (fn. 38).

⁴⁰ Amazon itself claims this: “*Amazon.com is the world’s largest online retailer.*”, see <https://aws.amazon.com/retail/case-studies/>.

⁴¹ For instance, according to the Dutch research company Veraart Research, Amazon’s online turnover in Europe is as much as its next three competitors combined, see *Ecommerce News*, “Top 10 online stores in Europe”, <https://ecommercenews.eu/top-10-online-stores-in-europe/>. It was reported that in 2018, Amazon captured a 31% share of U.K. and a 47% share of German Internet retail sales, see *Coresight Research*, Amazon Outpaces the UK and German E-Commerce Markets in 2018, 8 February 2019, <https://coresight.com/research/amazon-outpaces-the-uk-and-german-e-commerce-markets-in-2018/>, based on *Euromonitor International* estimates. This is confirmed by the “Amazon Market Dominance Index” calculated by the *University of St. Gallen*, see Herrmann, S., “Die Hälfte der E-Commerce-Umsätze macht Amazon”, https://www.wuv.de/tech/die_haelfte_der_e_commerce_umsaetze_macht_amazon. This is confirmed as well by a market analysis of the *EHI Retail Institute*, see Randler, S., “Neue Marktdaten: So beherrscht Amazon den deutschen Online-Handel”, <https://neuhandeln.de/neue-marktdaten-so-beherrscht-amazon-den-deutschen-online-handel/>.

⁴² These are, for instance, cases before the German Federal Cartel Office (*Bundeskartellamt*): See *Bundeskartellamt*, press release of 17 July, 2019, “Bundeskartellamt obtains far-reaching

B. Behavioral concerns: Amazon grew on the back of its competitors and was soon able to exploit relationships with its “partners”

Amazon’s unchecked growth has built the foundation for distorting the level playing field between Amazon and its “partners” as well as retail competition. The following outlines some of the most apparent horizontal and vertical restraints of competition associated with Amazon.

1. Some of the horizontal restraints vis-à-vis competitors

Aggressiv

in 1997 (see above)⁴⁶. Although it may be hard to detect any predatory pricing for a specific product (and thus an abuse of dominance under EU competition law⁴⁷), pricing below actual costs generally becomes rational for Amazon when it can (expect to) achieve significant scale advantages in the future, and when it can increase profits of other business units (for example, through increased bargaining power). This is a structural concern for competition in the retail sector, but also with regard to digital content services.

In addition, Amazon can enter any retail market by **leveraging** its conglomerate power. As internal Amazon documents revealed by the US House of Representatives confirm, when acquiring companies, Amazon is “willing to pay for market position as it’s hard to catch the leader”.⁴⁸ Jeff Bezos himself wrote the following in an e-mail regarding the acquisition of the home security and smart home company Ring Inc.: “To be clear, my view here is that we’re buying market position – not technology”.⁴⁹ This is a prime example of a “killer acquisition”, that is, the strategic acquisition of a company – by all means – that may emerge as a strong direct competitor later.⁵⁰ Internal documents reveal as well that, prior to a hostile takeover, Amazon resorts to aggressive pricing strategies and dumping to drive competitors out of the market.⁵¹

Amazon’s pricing strategies are at least partly enabled by the **cross-subsidisation** of its retail activities through profits generated by other services, most notably AWS. For many years, Amazon operated with a negative cash flow.⁵² This means that Amazon was receiving

⁴⁶ Bezos, J. (fn. 34).

⁴⁷ It should also be noted that, already under existing EU competition rules, proof of the possibility of recoupment of losses suffered by the application of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive under Article 102 TFEU, see ECJ, Case C-202/07 P, judgment of 2 April 2009 – *France Télécom v Commission*, para. 110. In particular, such proof is unnecessary in circumstances where the eliminatory intent of the undertaking at issue can be presumed in view of such undertaking’s application of prices lower than average variable costs, see ECJ, Case C-333/94 P, judgment of 14 November 1996 – *Tetra Pak v Commission*, para. 44.

⁴⁸ Helbling, J., e-mail dated 11 October 2017, <https://judiciary.house.gov/uploadedfiles/00214132.pdf>.

⁴⁹ Bezos, J., e-mail dated 15 December 2017, <https://judiciary.house.gov/uploadedfiles/00173560.pdf>.

⁵⁰ The documents refer to the acquisition of Ring, a company specialised in smart home technology. Ring could potentially have become a strong competitor in the field of smart-home tech, where Amazon is active with Echo and Alexa, for instance.

⁵¹ In addition, the documents revealed contain internal communications about Amazon’s purchase of Diapers.com as well business practices prior to the transaction with the goal of enabling such purchase. Such documents confirm the practice to aggressively cut prices to force competitors out of business. In this case, such pricing strategy allowed Amazon to buy and integrate the company. However, more generally, these documents show how the special (automated) pricing rules are set up to undercut the prices of a targeted competitor.

⁵² Sussman, S. (fn. 44).

less money than it was spending. In particular, Amazon's international retail operations are constantly loss-making.⁵³ This means that its international expansion is very likely cross-subsidised by profit-generating divisions such as (in particular) AWS.

However, AWS is not the only service that cross-subsidises Amazon's retail expansion. According to very recent research, Amazon's revenue from Seller fees has grown to such extent that Sellers are effectively cross-subsidising Amazon's retail activities. In 2019, Seller fees covered more than three-quarters of Amazon's total shipping and fulfilment expenses.⁵⁴ This includes, for example, the costs of operating Amazon's warehouses and overhead costs such as providing customer service and payments processing. Similarly, Amazon cross-subsidises its own marketing expenses almost entirely through the sale of advertising services. **Amazon Advertising** generated around \$4.2 billion in revenues on its own platform in Q2 2020 (41% YoY growth), which matches Amazon's \$4.3 billion marketing costs.⁵⁵

This means that Amazon can pay for retail competition to cease, and willing to forgo profitability in the mid- to long-term to cement its future dominance. UNI is convinced that Amazon actively has used such leverage to "discipline" the market and its retail competitors. This "**chilling effect**" on competition is what the tools of competition law, for example merger control and predatory pricing rules, should ideally prevent from happening. Yet, it is apparent that such rules failed to prevent such inefficient market outcome in the past. Ultimately, this leads to a tough price battle at retail level, which can be qualified as destructive competition.

Exploitation of Sellers' data to adjust own product offerings. Aggressive pricing is not the only way Amazon enters markets in an anti-competitive manner and how it can sustain aggressive pricing strategies. The European Commission is currently investigating the extent to which Amazon is poaching ideas from its retail competitors⁵⁶. The Commission believes that Amazon is using the data it gathers through its online marketplace regarding the success of a product to adjust its own offerings for such product. When recently questioned, Mr Bezos conceded Amazon may have used data regarding third-party sellers to inform business decisions regarding its own service or products. Evidence disclosed to the representatives

⁵³ Operating loss of the "International" segment amounted to almost \$9 billion in the past five years: \$699 million in 2015, \$1.28 billion in 2016, \$3.06 billion in 2017, \$2.14 billion in 2018 and \$1.7 billion in 2019, see Amazon.com, Inc.'s 2019 Form 10-K, p. 25 and 2017 Form 10-K, p. 26.

⁵⁴ *Mitchell, S./Knox, R./Freed, Z.* (Institute for Local Self-Reliance), "Report: Amazon's Monopoly Tollbooth", 28 July 2020, https://ilsr.org/amazons_tollbooth/.

⁵⁵ Amazon.com, Inc., Q2 2020 Earnings Release, https://s2.q4cdn.com/299287126/files/doc_financials/2020/q2/Q2-2020-Amazon-Earnings-Release.pdf, pp. 8, 14.

⁵⁶ European Commission, "Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon", 17 July 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291; mlex, "Amazon nears EU antitrust charges over use of data", 11 June 2020, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1197574&siteid=190&rdir=1>; mlex, "Probe of Amazon's data practices is "progressing", Vestager says", 30 January 2020, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1159206&siteid=190&rdir=1>

shows that Amazon's internal guidelines with the goal of prohibiting the exploitation of Sellers' sales data are not enforced. An Amazon employee was quoted as follows: "*They just say don't help yourself to the data. It's a candy shop, anyone can have access to the data they want.*"⁵⁷ This means that it is very likely that employees responsible for the introduction of new Amazon-branded products used the data of retail competitors on Amazon's own platform (that is, Sellers) regarding pricing, popularity, and profits to inform their decisions – despite an internal policy "preventing" such practice.

2. Some of the vertical restraints vis-à-vis its "partners"

Amazon's overwhelming buying power is causing a significant dependence on the part of Suppliers of goods and services. There are countless reports as to how Amazon has immense leverage over its suppliers in a wide range of industries because of its growing market power.⁵⁸ Given that upstream and downstream Suppliers (Vendors⁵⁹, logistics companies) are dependent on Amazon's demand, they have to offer substantial discounts to Amazon. Sellers⁶⁰ are squeezed more and more and restricted in their contractual freedom, even when selling outside of the Amazon channel.

Vendors. Being a Vendor to Amazon has the obvious advantage of high-volume sales and potentially consistent demand. However, such advantages create strong dependencies as well. Plus, Amazon is known to be one of the toughest and roughest negotiators.⁶¹ Once a Vendor has negotiated a wholesale contract with Amazon, Amazon is known for coming back to the table to renegotiate and lower the current wholesale price over and over again in the course of a partnership. Amazon can simply outplay its bargaining power and decrease Vendors' profit margin in every such negotiation.

The exploitation of big data sets is also a concern in this regard. Amazon – not its wholesale suppliers – has the direct relationship with consumers (because Amazon is selling the products). Access to such customer and sales data provides Amazon with an advantage in terms of market exploration and thus the ability to start self-supplying such demand at low risk and at a lower cost if needed (so-called **Private Label Products**, for example under the **AmazonBasics** brand). The implied threat to imitate successful product lines provides Amazon with a strong bargaining advantage over Vendors.

In addition, Amazon reportedly monitors products that are sold through other channels. This means that if a Vendor negotiates a wholesale price for a particular product on Amazon, but sells the same product on another channel (for example, eBay) at a cheaper price,

⁵⁷ Lee, D./Murphy, H. (fn. **Error! Bookmark not defined.**).

⁵⁸ Kim, E. (CNBC), "As Amazon's dominance grows, suppliers are forced to play by its rules, 21 December 2017, <https://www.cnbc.com/2017/12/21/as-amazons-dominance-grows-suppliers-are-forced-to-play-by-its-rules.html>.

⁵⁹ See fn. 4 for definition.

⁶⁰ See fn. 4 for definition.

⁶¹ Kim, E. (fn. 58).

Amazon will lower the price of the Vendors' products on Amazon.com and will likely demand an even lower wholesale price.

Amazon's power over Vendors is exemplified by Vendors' reaction during the Covid-19 crisis. While demand for certain products during the crisis was increasing swiftly, Vendors (had to) focus on delivering to Amazon what Amazon's algorithms predicted the company would need – otherwise they would have permanently lost the large Amazon customer base. While Vendors were stocking Amazon's warehouses, competing retailers had to take the leftovers or were left with nothing.⁶² Such enforced prioritisation not only restricts the Vendors' ability to sell to whomever they want. Such shifting supplies also have repercussions on opportunities of competing retailers to compete with Amazon on the merits.

Sellers. There are significant barriers to start a business as an independent online retailer. To generate sales, new entrants need to attract traffic, which results in high traffic acquisition or brand-building costs. This is why the vast majority of online retailers at least also uses the services of merchant platforms. Given indirect network effects, the Amazon Marketplace became the central e-commerce infrastructure to connect buyers of products and retailers (Sellers). Amazon's horizontal market power as merchant platform is nearly incontestable. In addition, this provides Amazon with the power to dominate the vertical relationship vis-à-vis Sellers (bargaining power). There are indications that Amazon is even going so far as to control and determine the prices that Sellers charge on its marketplace.

To this end, in August 2020, the German Federal Cartel Authority (*Bundeskartellamt*) launched a new competition investigation into whether Amazon is abusing its online market dominance “to exert **pricing pressure** on sellers”⁶³. Sellers had complained that Amazon was pressuring them to lower their prices on Amazon's platform, thereby threatening their profitability. In March 2020, the UK Competition and Markets Authority likewise requested “urgent” talks with Amazon regarding its influence on the pricing of products on its marketplace⁶⁴. At the peak of the coronavirus crisis, in March 2020 the Italian competition authority also commenced a probe into Amazon over misleading reviews and prices for hand sanitizers and face masks⁶⁵.

⁶² See *Dudley, R.*, “The Amazon Lockdown: How an Unforgiving Algorithm Drives Suppliers to Favor the E-Commerce Giant Over Other Retailers”, 26 April 2020, <https://www.propublica.org/article/the-amazon-lockdown-how-an-unforgiving-algorithm-drives-suppliers-to-favor-the-e-commerce-giant-over-other-retailers>, citing numerous sources.

⁶³ Bloomberg, “Amazon Probed by German Antitrust Body Over Prices: FAZ”, 16. August 2020, <https://www.bloomberg.com/news/articles/2020-08-16/amazon-probed-by-german-antitrust-body-over-prices-faz-reports>.

⁶⁴ mlex, “Amazon, eBay in ‘urgent’ talks with UK CMA over Covid-19 profiteering”, 31 March 2020, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1175308&siteid=190&rdir=1>

⁶⁵ mlex, “Amazon and eBay's reviews and prices for hand sanitizers prompt Italian probe”, 12 March 2020, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1170155&siteid=190&rdir=1>;

mlex, “Amazon, eBay probed in Italy over coronavirus-related products”, 12 March 2020, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1170152&siteid=190&rdir=1>.

In July 2019, the *Bundeskartellamt* had already closed an abuse of dominance proceeding against Amazon, in which it examined the company's general terms of business and certain practices vis-a-vis Sellers on its German marketplace amazon.de⁶⁶. More than 100 merchants had complained about various unfair trading conditions. As a result of the probe, Amazon has amended the general terms of business for Sellers on its marketplaces objected to by the authority, and has promised further alterations to its marketplace operation to dispel competition concerns regarding the practices contested

Another practice that raised concerns is Amazon **pressuring Sellers to use other Amazon products** if they wish to appear in Amazon's results. In April 2019, the Italian competition authority opened a probe regarding Amazon's abuse of dominance in pushing Sellers to use Amazon's own logistics services⁶⁷. In April 2020, the Italian authority opened another probe against Amazon, this time regarding the suspicion that it prohibited the sale of particular products by Sellers of electronics that did not participate in an official Amazon programme.⁶⁸ Again, Amazon's strategy appears clear – Sellers are supposed to use all of Amazon services – “all or nothing”.

Another focus has been on Amazon's attempts to force Sellers to grant the best prices (only) on Amazon's marketplace. When Sellers offer products for lower prices outside of Amazon, the company “reserves the right to force the supplier to [...] lower its price”.⁶⁹ Until 2019, Amazon openly enforced so-called “strict price-parity clauses” for online traders in the US. The Federal Trade Commission is reportedly still investigating complaints that the practice is ongoing.⁷⁰ This greatly resembles the situation that can currently be observed in Europe. The *Bundeskartellamt* and the British Office of Fair Trading have already investigated price-parity clauses that Amazon used to impose on European merchants.⁷¹ However, there are reports that Amazon is continuing to enforce the exact same strategy through its “**Fair**

⁶⁶ Bundeskartellamt, “Case summary: Amazon amends its terms of business worldwide for sellers on its marketplaces – Bundeskartellamt closes abuse proceedings”, 17 September 2019, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/17_07_2019_Case_Summary_Amazon.html

⁶⁷ mlex, “Amazon faces dominance inquiry in Italy focused on logistics”, 16 April 2019, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1177472&siteid=190&rdir=1>

⁶⁸ mlex, “Apple, Amazon face Italian probe over banning non-official traders' online sales”, 22 July 2020, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1210109&siteid=190&rdir=1>; mlex, “Amazon, Google antitrust probes in Italy faces delay due to Covid-19”, 3 April 2020, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1176684&siteid=190&rdir=1>

⁶⁹ See <https://judiciary.house.gov/uploadedfiles/00190108.pdf>.

⁷⁰ *J. Sicro/L. Crofts* (MLex), “Amazon ends price-parity clauses for online traders in US”, 12 March 2019.

⁷¹ Due to such intervention, Amazon already officially abandoned such clauses in Europe in 2013. See German Federal Cartel Office (*Bundeskartellamt*), press release of 26 November 2013, “Amazon abandons price parity clauses for good”, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html.

Pricing Policy⁷². There are relatively recent reports that Amazon is still enforcing price parity “through the back door”, notably by withholding access to the “Buy Box” in case merchants do not offer “the most competitive prices”.⁷³ If confirmed (or even if there is such impression in the market), Amazon is significantly stifling intra-platform competition and restraining the freedom of Sellers to offer competitive prices in other retail channels (where they have to bear lower transaction fees). This reduces the overall profitability of Sellers and makes them even more dependent on Amazon.

Amazon is squeezing Sellers more and more. First, over time, Amazon significantly increased the commissions it takes from Sellers. According to research, “*Amazon keeps an average of 30 percent of each sale made by independent sellers on its site, up from 19 percent just five years ago*”.⁷⁴ Second, Amazon is extracting additional surplus/rents from Sellers by tying their ability to generate sales on its site (notably by being visible in the so-called “Buy Box”) to their willingness to buy additional Amazon services, including its fulfilment (Fulfilment by Amazon) and product advertising services (Amazon Advertising, for example **Sponsored Products**, which are cost-per-click product ads on Amazon’s websites and apps).⁷⁵ Mr Bezos confirmed this during the hearing of the US House of Representatives when he said that “*indirectly the Buy Box does favour products that can be shipped with Prime*”. Given user biases (in particular saliency biases)⁷⁶ and user inertia, Sellers have a strong incentive to be visible or awarded in the Buy Box, as otherwise sales decline strongly. Overall, this makes the fulfilment of its own orders cheaper, so that Sellers using Fulfilment by Amazon and Amazon Advertising effectively cross-subsidise Amazon’s own retail activities and expansion.

Amazon’s conflicts with Sellers has a long history. It goes back to its beginnings when Amazon got entangled in several competition investigations concerning its dealings with e-

⁷² The Fair Pricing Policy is available on the Amazon seller central website through several redirects (Help for Amazon Sellers > Manage inventory > Create a Pricing Rule > Amazon marketplace fair pricing policy), see <https://sellercentral-europe.amazon.com/gp/help/external/help.html?itemID=5TUVJKZHUVMN77V>. It reads: “*In our mission to be the world’s most customer-centric company, Amazon strives to provide our customers with the largest selection, at the lowest price and fastest delivery – and sellers play an important role. Amazon regularly monitors the prices of items in our marketplaces, including shipping costs, and compares them with other prices available to our customers. If we see pricing practices on a marketplace offer that harms customer trust, Amazon may take action, such as removing Buy Box, removing the offer, or in serious or repeated cases, suspending or terminating selling privileges. Pricing practices that harm customer trust include, but are not limited to: [...] setting a price on a product or service that is significantly higher than recent prices offered on or off Amazon; [...]*”

⁷³ Höschl, P., “Preisparität durch die Hintertür: Wie Amazon seinen Händler doch wieder die Preise diktiert”, 22 August 2019, <https://www.shopanbieter.de/14611-preispartitaet-durch-die-hintertuer-wie-amazon-seinen-haendler-doch-wieder-die-preise-diktiert>.

⁷⁴ Mitchell, S./Knox, R./Freed, Z. (fn. 54).

⁷⁵ Mitchell, S./Knox, R./Freed, Z. (fn. 54).

⁷⁶ The salience bias (also known as perceptual salience) describes our tendency to focus on items or information that are more noteworthy while ignoring those that do not grab our attention, see <https://thedecisionlab.com/biases/saliency-bias/>.

booksellers⁷⁷. Based on the investigations, Amazon had to make some concessions⁷⁸. However, booksellers remain sceptical of its practices⁷⁹.

Logistics companies. Vendors and Sellers are not alone with such struggles. Similarly, Amazon's overwhelming buying power has resulted in immense price competition in the logistics sector. Given that logistics companies are dependent on Amazon business, they are forced to offer substantial discounts to Amazon.⁸⁰ This is exacerbated by Amazon's further vertical integration (Amazon Logistics and Amazon Shipping).⁸¹

Its high demand for logistics services has resulted in a situation where Amazon can dictate prices and terms with logistics companies. Apart from the rather obvious imbalance of power between Amazon and participants of both the Amazon Delivery Service Partner programme and Amazon Flex, Amazon even exerts immense pricing pressure on some of the largest logistics companies in the world (such as UPS and FedEx in the US.⁸² or DHL and Hermes in Germany – Amazon's second largest market).

A good case study on vertical dependence is Germany. It is estimated that Amazon sends about a third of the 1.4 billion parcels delivered to private customers in Germany each year.⁸³ While Deutsche Post DHL Group "*is the world's leading logistics company*" according to its own description,⁸⁴ internal reports show the significant pricing pressure Amazon exerts on DHL.⁸⁵ Such report shows that Amazon accounts for 17.6 percent DHL parcel volume, making it the by far DHL's largest customer in terms of volume. On the other hand, such report also shows that Amazon is exerting massive pressure on prices by switching some of its

⁷⁷ The New York Times, „Amazon's E-Books Business Investigated by European Antitrust Regulators”, 11 June 2015, <https://www.nytimes.com/2015/06/12/business/international/european-union-amazon-ebooks-antitrust-investigation.html>.

⁷⁸ Euractiv, “Deal in sight for Amazon in e-books case against EU”, 21 March 2017, <https://www.euractiv.com/section/digital/news/deal-in-sight-for-amazon-in-e-books-case-against-eu/>

⁷⁹ American Booksellers Association, “Spotlight on Amazon”, <https://www.bookweb.org/advocacy/spotlight-on-amazon> with a list of critical articles.

⁸⁰ According to estimations, Amazon “enjoyed a 70% discount over regular delivery prices” in the US, see Khan, L. (fn. 43), p. 775.

⁸¹ According to a McKinsey study, the large online retailers such as Amazon are expected to handle more than 50% of global B2C parcel volumes on their own in 2025. See McKinsey, Press release of 17 June 2019, “Studie: Jeder Deutsche erhält im Schnitt 24 Pakete pro Jahr”, <https://www.mckinsey.de/news/presse/2019-06-17-postal-network#>.

⁸² See Pandey, E., “Amazon sets eyes on its next target”, 29 April 2019, <https://www.axios.com/amazons-shipping-industry-ups-fedex-79b25285-8864-4069-9ae8-6097835c96eb.html>.

⁸³ Thomasson, E./Alkousaa, R. (fn. 28), referring to logistics consultancy MDU.

⁸⁴ <https://www.dpdhl.com/en/about-us/at-a-glance.html>.

⁸⁵ Schlautmann, C., “So abhängig ist die Post von Amazon”, 24 June 2018, <https://www.handelsblatt.com/unternehmen/dienstleister/paketgeschaeft-so-abhaengig-ist-die-post-von-amazon/22724300.html>.

supply to low-cost competitors such as the Otto subsidiary Hermes. According to the report, Amazon complained about the comparatively high prices of DHL, referring explicitly to Hermes (a company that is known for exceptionally precarious working conditions)⁸⁶. Although Amazon brings such significant volumes of parcels, DHL reportedly makes rather little profit with such volumes.⁸⁷

Against this background, it is no surprise that Amazon's buying power (monopsony) has led to destructive competition between logistics companies who fulfil last-mile-deliveries for Amazon. The conditions at a logistics company are dictated by its major customer. This similarly applies to air freight services.⁸⁸ Amazon's exploitation of its buying power increases the costs for all other (less powerful) demanders of parcel services (including consumers)⁸⁹ when logistics companies attempt to cross-subsidise low cost offers to Amazon (known as the "**waterbed effect**"⁹⁰).

Thus, Amazon is exploiting its size and scale advantages as a buyer vis-à-vis logistics companies. To make matters worse, Amazon is simultaneously increasing such pressure through its vertical integration into deliveries (Amazon Logistics). Amazon Flex and the Amazon Delivery Partner programme are further undermining the industry's working standards. With its new business model, Amazon is not only displacing regular employment, but is shifting the entrepreneurial risk completely to private courier drivers and small contractors. While traditional logistics companies often have to offer a universal service, Amazon can pick the most profitable routes to serve them cost-efficiently itself with its own deliverers. Again, others pay the price for such competitive advantage.

C. Spillover effects: Structural and systemic challenges as well as anti-competitive conduct result in high social costs

⁸⁶ See, for example, *Maier, J.* (Frankfurter Rundschau), "Hungerlöhne bei der Otto-Tochter", 17 January 2019, <https://www.fr.de/wirtschaft/hungerloehne-otto-tochter-11279145.html>.

⁸⁷ The internal report, for example, puts the profit of a standard package sent by independent Sellers (not using Fulfillment by Amazon) at 34.5 cents. In contrast, it states the margin for shipments commissioned by Amazon itself as only "up to 0.21 euros". The difference in yield is hardly surprising. After all, DHL charges Amazon just €2.55 per parcel, whereas DHL charges the average Seller (not using Fulfillment by Amazon) an average of €2.97, see *Schlautmann, C.* (fn. 85).

⁸⁸ *Kim, E.* (fn. 58).

⁸⁹ See German *Federal Network Agency (Bundesnetzagentur)*, press release of 29 January 2020, "Bundesnetzagentur überprüft Erhöhung der Paketpreise für Privatkunden", https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2020/20200129_Paket.html.

⁹⁰ See *Inders, R.*, "Buyer Power and the "Waterbed Effect", January 2007, <http://competitionpolicy.ac.uk/documents/107435/107590/ri2.pdf>: "Broadly speaking, the "waterbed effect" is a shorthand term for a situation in which (non cost-related) price reductions are negotiated with suppliers by large buyers and result in higher prices being charged by suppliers to smaller buyers".

The out-of-control corporate power and the anti-competitive struggles that the entire e-commerce value chain is facing inevitably result in spillover effects on workers' rights and labour conditions. Most notably, Amazon's exponential growth on the back of its competitors as well as suppliers of products and services reduced their ability to achieve reasonable profits and thus their leeway to sustain good working conditions and fair remuneration. Amazon's "partners" and competitors are forced to pass on the negative effects of such anti-competitive pressure to their workforces, resulting in a form of social spillover effect. Below we describe some of such negative effects on social standards.

Job losses. Amazon's market foreclosure practices are leading to the exit of "classical" retailers (mostly brick-and-mortar, but also online competitors), resulting in overall job losses.⁹¹ Research in 2015 suggests that, with every job it creates, Amazon displaces approximately two jobs at brick-and-mortar stores.⁹² Given the increasing scale advantages in terms of "efficiency" and Amazon's increased use of automated processes without human labour, such ratio is very likely even higher today. In France as well, for instance, Amazon is accused of destroying jobs. There are concerns that most jobs Amazon creates are merely temporary jobs and, above all, that the overall impact of Amazon is negative for employment in France. According to estimates, the reality is that, when Amazon creates one job in France, local companies lose 2.2 jobs.⁹³

Replacement by "lower value" jobs. A study from the US found in 2019 that, due to Amazon's expansion, "*jobs are being gradually replaced with warehousing and delivery workers, many of whom are contractors, whose place of employment is on the urban periphery*".⁹⁴ In addition, such "lower value" jobs are often merely on a temporary basis to cover demand peaks. Similarly, such jobs are in sectors that are controlled by or dependent on Amazon (logistics, contractors, "gig employees"). However, many jobs are not replaced by human labour at all, but warehousing robots. Amazon acquired robotics company Kiva Systems in 2012 (later renamed **Amazon Robotics**). Since 2014, Amazon warehouses and fulfilment centres around the globe are operating with thousands of robots. This is putting Amazon's workers as well as workers in dependent industries under immense pressure and is decreasing their (collective) bargaining power: "*What Amazon is doing, however, is taking*

⁹¹ See, for example, *Civic Economics*, "Prime Numbers: Amazon and American Communities", 4 April 2018 <https://civiceconomics.wordpress.com/2018/04/04/prime-numbers-amazon-and-american-communities/>, with regard to the US labour market. This is also confirmed by *Mitchell, S./LaVecchia, O.* (fn. 92), p. 33.

⁹² *Mitchell, S./LaVecchia, O.* (Institute for Local Self-Reliance), "Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities", November 2016, https://ilsr.org/wp-content/uploads/2020/04/ILSR_AmazonReport_final.pdf, p. 35.

⁹³ *Rolland, S.* (La Tribune), "Mounir Mahjoubi accuse Amazon de détruire 7.900 emplois et appelle à acheter français", 22 November 2019, <https://www.latribune.fr/technos-medias/mounir-mahjoubi-accuse-amazon-de-detruire-7-900-emplois-et-appelle-a-acheter-francais-pour-noel-833788.html>.

⁹⁴ *Kenney, M./Zysman, J.*, "The Platform Economy and Geography: Restructuring the Space of Capitalist Accumulation", 3 December 2019, <https://ssrn.com/abstract=3497978>, p. 23.

work that has historically provided routes to a prosperous, satisfying life, degrading those jobs, and meanwhile, planning to automate them.”⁹⁵

Lowering social standards. On a general basis, Amazon is lowering standards in entire industries. Amazon’s “*management ethos*” and “*drive to automation and algorithmic monitoring*” to increase workers’ efficiency is considered “*to set [lower] labor standards in logistics*”.⁹⁶ Amazon is undercutting wages of warehouse workers, with wages that are significantly lower than wages for comparable work in the same area.⁹⁷ Drivers of logistics services are constantly threatened by being replaced by Amazon’s poorly paid contractors in the short-term,⁹⁸ and self-driving trucks, delivery robots and drones in the long-term. This reduces their incentive and ability to ask their employers for fair remuneration or better working conditions. Being deprived of their profitability and operating at very thin margins, such companies may not even be able to answer any such demand.

Rise of “platform-dependent entrepreneurs”. The discrepancy in bargaining power applies to the entire e-commerce value chain. Given that Amazon has the ability to increase its commission or reduce the wholesale price, both Vendors and Sellers are, in fact, “platform-dependent entrepreneurs”⁹⁹. As such, they are “*for[ed] to put downward wage pressure on their workers*”.¹⁰⁰ This also applies to Amazon Flex drivers and Amazon Delivery Service Partners.

Couriers’ rights as an example. Couriers’ rights are considered “*the dark side of Germany’s online shopping boom*”.¹⁰¹ The vertical dependency¹⁰² of all sizes of logistics companies described above has sparked a downward spiral as regards labour conditions and wages in the entire logistics sector, including more and more subcontracting and sub-subcontracting of delivery services. This is undermining working time regulations and is

⁹⁵ Mitchell, S./LaVecchia, O. (fn. 92), p. 47.

⁹⁶ See Kenney, M./Zysman, J. (fn. 94), p. 27.

⁹⁷ Mitchell, S./LaVecchia, O. (fn. 92), p. 33.

⁹⁸ In this regard, see also Kenney, M./Zysman, J. (fn. 94), p. 27.

⁹⁹ Cutolo, D./Kenney, M., “Platform-dependent entrepreneurs: Power asymmetries, risks, and strategies in the platform economy”, Berkeley Roundtable on the International Economy Working Paper No. 2019-3.

¹⁰⁰ See Kenney, M./Zysman, J. (fn. 94), p. 27.

¹⁰¹ Schaer, C. (Handelsblatt), “The dark side of Germany’s online shopping boom”, 18 November 2018, <https://www.handelsblatt.com/english/companies/courier-rights-the-dark-side-of-germanys-online-shopping-boom/23694948.html>

¹⁰² “But while the number of packages has risen steadily, the cost of sending them has not. Giant retailers like Amazon put pressure on delivery companies and the price per package delivered keeps falling.” See Schaer, C. (fn. 101).

putting pressure on wages.¹⁰³ *Minimum wage laws and regulations governing working time are broken.*¹⁰⁴ The structural market challenges are leading to greater and greater discrimination of workers, outplaying them against each other, threatening permanent employees with being replaced with cheaper workforces. This is evidence of a social spillover effect of Amazon's monopsony. In an attempt to respond to systematic underpayments and social security fraud, the German legislator even felt obliged to adopt a law making logistics firms liable for their subcontractors' behaviour.¹⁰⁵

Increase in inequality and decrease in collective bargaining power. Amazon's new market entries are maintaining constant pressure on prices and thus wages in many industries and geographies.¹⁰⁶ This suggests that Amazon's business model is increasing inequality.¹⁰⁷ In the course of Amazon's strategy to either engage smaller subcontractors or even "gig self-employed persons", it is becoming more and more difficult for workers to unionise and address such social issues together, while meeting on a more equal footing. As Amazon's reliance on temporary workers, contractors, "gig" workers and its investments in automatization show, "*Amazon's vision of labor is one that seeks to shift its profits to an ever-smaller group at the top*",¹⁰⁸ most notably its own shareholders.

In conclusion, Amazon is fighting to become the one-stop-shop for all e-commerce matters on the back of workers (including their own) and contractors. Such conduct is leading to an overall lowering of social standards, such as workplace safety, and is generally suppressing wages. Amazon's further growth and vertical integration will ultimately lead to more inequality.

¹⁰³ According to reports, notably Eastern European drivers are enticed to Germany to deliver parcels. "*But once here, promises of high wages, health insurance and decent hours are regularly broken.*", see Schaer, C. (fn. 101).

¹⁰⁴ Some subcontractors pay as little as €4.50/hour for shifts that last up to 16 hours, see DW, "German labor minister tackles working conditions in parcel delivery sector", 2 March 2019, <https://p.dw.com/p/3EMcJ>. Minimum wage is currently €9.35 in Germany.

¹⁰⁵ See German *Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales)*, press release of 25 November 2019, "Sozialer Schutz und faire Löhne. Paketboten-Schutz-Gesetz gilt seit dem 23. November 2019.", <https://www.bmas.de/DE/Presse/Meldungen/2019/sozialer-schutz-und-faire-loehne.html>

¹⁰⁶ See Kenney, M./Zysman, J. (fn. 94), p. 28; Mitchell, S./Knox, R./Freed, Z. (fn. 74) regarding Sellers: "*Amazon's high fees make it nearly impossible for sellers to sustain a profitable business.*"

¹⁰⁷ See Kenney, M./Zysman, J. (fn. 94), p. 28: "*The inequality occurs through the destruction of local retailing, the inherent structure of its Marketplace to put downward pricing pressure on its third-party vendors, and its logistics chain using third-party vendors that are paid far less than incumbents, and the relentless warehouse automation ensuring ever fewer jobs per dollar of retail sales.*"

¹⁰⁸ Mitchell, S./LaVecchia, O. (fn. 92), p. 52.

V. Systemic challenges and spillover effects on workers' rights must be addressed by targeted regulation

In the opinion of UNI, existing and potential business practices of online intermediaries acting as digital gatekeepers, including Amazon, cannot be tackled merely through the (more) vigorous application of existing competition law. Any case-by-case enforcement can only address singular concerns – without accounting for the broader context and more general (social, economic and democratic) concerns. Any remedy in such individual enforcement action will not address the core concerns; in particular, the tech giants' sheer size, diversification and vertical integration that enables them to act independently from everyone – governments, tax authorities, competitors – and in case of Amazon in particular, Suppliers and logistics partners.

In this section we would like to outline how, in general, all online platforms acting as digital gatekeepers should and could be regulated (A.). We will then focus on the specific requirements and considerations that apply to regulating the Amazon eco-system (B.) before turning to the broader aspect of how workers' rights should be taken into account in the framework of the envisaged regulation (C.).

A. Overall approach to regulating digital gatekeepers

Over the last ten years it has become apparent that competition law alone is insufficient to address the societal and competition concerns raised by dominant intermediaries that act as gatekeepers on particular markets. The conduct of Google, Amazon, Facebook and Apple (“GAFA”) has triggered multiple competition complaints from various affected industries. The Commission has issued three important competition decisions against Google¹⁰⁹. However, the preceding investigations took too long, and it appears that Google's measures to implement the imposed remedies are not making any difference¹¹⁰. Hence, as of today, we

¹⁰⁹ European Commission, Case AT.39740, decision of 27 June 2017 – *Google Search (Shopping)*; Case AT.40099, decision of 18 July 2018 – *Google Android*; Case AT.40411, decision of 20 March 2019 – *Google Search (AdSense)*.

¹¹⁰ *Chee, F. Y.* (Reuters), “Shopping rivals urge EU to act against Google for allegedly favouring own service”, 28 November 2019, <https://www.reuters.com/article/eu-alphabet-antitrust/shopping-rivals-urge-eu-to-act-against-google-for-allegedly-favouring-own-service-idUSL8N2875J7>; Open letter from 41 comparison shopping services, “Google's ongoing abuse of market power is harming consumers and digital companies all over Europe. Comparison shopping services call for vigorous actions against Google's non-compliance with the European Commission's decision in the Google Search (Shopping) case”, 28 November 2019, available at https://www.ladenzeile.de/downloads/Joint_Letter_of_41_CSSs_to_Ms_Vestager_on_Google_Shopping-Non-Compliance_28.11.2019.pdf; *Lomas, N.* (TechCrunch), “Google's ‘no choice’ screen on Android isn't working, says Ecosia – querying the EU's approach to antitrust enforcement”, <https://techcrunch.com/2020/07/30/googles-no-choice-screen-on-android-isnt-working-says-ecasia-querying-the-eus-approach-to-antitrust-enforcement/>; *Windsor, R.* (Forbes), “EU Fails to Demand The One Remedy From Google That Could Make A Difference”, 18 July 2018, <https://www.forbes.com/sites/richardwindsoreurope/2018/07/18/eu-fails-to-demand-the-one-remedy-from-google-that-could-make-a-difference/#c0d71987dac2>.

cannot see any genuine improvements resulting from such decisions. Considering the many similar complaints that followed¹¹¹, the decisions do not appear to have sufficiently deterred the members of the GAFAs from acting anti-competitively¹¹².

Platform regulation needs to be “asymmetric”: The failure of competition law to sufficiently address the issues is, however, not surprising. It merely reflects the facts that the concern raised by the companies in question are based on permanent and lasting market failures. Competition law is not the right tool to deal with such permanent market failures. Specific regulation is the appropriate answer. It needs to be ensured, however, that such regulation remains proportionate to the threats and does not limit the development of those companies that could discipline the tech giants which are nearly unassailable at this time. Accordingly, any specific regulation of digital companies needs to make distinctions based on a company’s market power and the threats it poses to competition (and society). In other words, the regulation needs to be “asymmetric”. For instance, the monopolies in the markets for general search services (Google) and online marketplaces (Amazon) can and need to be subject to much stricter regulatory supervision as compared to, for instance, the highly competitive markets for online sellers and merchants. In this respect, we note that the European Platform-to-Business Regulation goes into the wrong direction, as it imposes the same obligations on all platforms, from the smallest website to the biggest global tech player. A tailored regulation cannot and must not treat unlike business alike.

To ensure that the regulation is limited to effectively taming those players that pose the highest risks, the Commission should develop a methodology to identify platforms with “significant market power” akin to the concept in telecoms law¹¹³.

Identifying SMP-platforms: The European Commission should introduce an *ex ante* regulation of digital platforms with significant market power (“SMP-platforms”). To identify such companies, the Commission should take recourse to the methodology used in the

¹¹¹ See for example *Chee, F. Y.* (Reuters), “Exclusive: Google’s job search draws antitrust complaints from rivals”, 13 August 2019, <https://www.reuters.com/article/us-eu-google-antitrust-exclusive/exclusive-googles-jobs-search-draws-antitrust-complaints-from-rivals-idUSKCN1V30IX>; *Espinosa, J.* (Financial Times), “Google accused of competition abuse in holiday rentals”, 10 February 2020, <https://www.ft.com/content/dc59e070-49c0-11ea-aeb3-955839e06441>; *Acton, M.* (mlex), “Google drew EU antitrust complaint from HomeToGo over self-preferencing”, 17 August 2020, <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1215764&siteid=190&rdir=1>; *Chee, F. Y.* (Reuters), “Exclusive: EU antitrust regulators say they are investigating Google’s data collection”, 30 November 2019, <https://www.reuters.com/article/us-eu-alphabet-antitrust-exclusive/exclusive-eu-antitrust-regulators-say-they-are-investigating-googles-data-collection-idUSKBN1Y40NX>.

¹¹² This was apparently even noted by a judge in the General Court discussing the Google Shopping case, see *an Dorpe, S.* (Politico), “EU judge suggests Google fine should be higher”, 14 February 2020, <https://www.politico.eu/article/eu-judge-suggests-google-fine-should-be-higher-european-commission-preferential-treatment/>

¹¹³ European Commission, “Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services”, OJ 2018/C159/01, 7 May 2018.

telecoms sector¹¹⁴. Accordingly, the Commission should (i) identify relevant platform (intermediation) services, (ii) define the corresponding markets, (iii) assess significant market power on those markets and (iv) analyse whether due to consistently high barriers to entry and a the number of affected transactions, competition law alone will suffice or specific regulation of the SMP-platform is merited. From our perspective, likely markets with SMP-platforms in need of regulation are the following: general Internet search (Google), browsers (Google Chrome), mobile operating systems (Apple iOS, Alphabet Android), app stores (Apple App Store, Google Play), social networks (Facebook), and – from our perspective most crucially – online marketplaces (Amazon).

Obliging SMP-platforms to comply with specific rules: The identified SMP-platforms should be subject to a set of tailored *ex ante* obligations. Such obligations should be imposed either directly by legislation or, following the SMP-analysis, per decision of a specialised regulatory body on a case-by-case and obligation-by-obligation basis. On a general basis, the list of obligations should encompass, at least, the following obligations – for all SMP-platforms:

Bundling and self-preferencing: SMP-platforms should not technically or commercially bundle other own services to their dominated platform. In particular, they should not provide services that operated on a separate market directly on their dominant platform. Google’s integrating of a job search service and Facebook’s integration of a marketplace are just two obvious examples. Similarly, SMP-platforms should not use their intermediation service to directly or indirectly promote a separate own service by crawling, indexing, ranking or displaying it more favourably than competing services.

Biased (paid) vs. unbiased (organic) intermediation: SMP-platforms should be subject to a neutrality obligation that ensures that consumers receive a sufficiently unbiased service. This would entail that, if a SMP-platforms offers both neutral (organic) and paid intermediation (for example, through advertisement), it should ensure a sufficient level of the former and must not present the paid intermediation more favourably.

Fair terms and conditions: SMP-platforms should be subject to strict fairness obligations. Their terms and conditions must be adequate, proportionate, transparent and non-discriminatory. The conditions imposed on Amazon by the German competition authority in its investigation of complaints from merchants¹¹⁵ may provide some initial guidance. However, the requirements should be even more specific.

¹¹⁴ See in particular European Commission, “Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services”, OJ 2018/C159/01, 7 May 2018, paras. 53 et seq.

¹¹⁵ See German Federal Cartel Office (*Bundeskartellamt*), “Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon’s online marketplaces”, 17 July 2019, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html.

Access to data: To allow competition with SMP-platforms to develop, SMP-platforms should be obliged to grant access in real-time to such anonymised data that is essential to compete with them. We are sceptical of a general obligation to share data, as this may reduce incentives to invest in data gathering tools and may multiply privacy concerns. However, data that cannot reasonably be duplicated because it is accumulated by one single source should be subject to a sharing obligation if it is required by others to compete with the company sourcing the data. The search data gathered by Amazon and Google via the marketplace and the general search service appear as examples.

Interoperability: To allow competition to develop, SMP-platforms should be obliged to make their service interoperable with competing services, thereby dissolving any lock-in effects, and neutralising the strong network effects that currently make them unassailable. For instance, Facebook could be obliged to enable the portability of user data to competing social networks. It could even be obliged to enable a communication of its users across various networks, for example by forwarding messages sent on Facebook to accounts of other social networks and to terminate messages sent from there.

While the approaches described above could be used for all digital gatekeepers, we envisage some more specific obligations regarding Amazon.

B. Regulating Amazon in particular

The Amazon of today is a structural risk for competition. Amazon's market conduct and the sheer size of its business have resulted in the excessive concentration of economic power and a structural problem for competition. Given Amazon's infrastructure-like role, entire industries are dependent on its strategic decisions. Competitors are between a rock and a hard place; they must choose between the two equally unpleasant options – to either try to compete against Amazon at a disadvantage, or to become reliant on a competitor in handling significant parts of their business. No one company should have such great power. Amazon's mere market power creates the risk of abuse if it remains unchecked. At any point in time, Amazon can decide to leverage its existing dominance in one market to gain a competitive head start in an adjacent market. This and intimidation tactics employed in the past have had and continue to have a strong chilling effect on all fronts.

Out-of-control corporate power can be tackled. Such systemic challenges, in particular spillover effects on workers' rights (working conditions and fair wages), can be tackled through targeted regulation. There are numerous obligations that could and should be imposed on Amazon to keep markets open and thereby competitive forces more even.

Overarching goals of specific regulatory tools. UNI believes that any regulation of Amazon should reverse the negative effects on workers. Regulation must prevent workers, suppliers, and competitors (both online and the local brick-and-mortar stores) from being squeezed. Amazon cannot be allowed to capture all the economic surplus that is created by their workforce under the guise of "efficiency" and increased "consumer welfare." Regulation (and competition law more generally) must focus on optimal outcomes for society as a whole, not a small number of corporations. Otherwise, prosperity, social justice and peace are at stake, making our democratic system vulnerable. Any system where one company can dictate the terms and standards in one or more industries is to be avoided by all means.

A general downsizing or control over further growth is necessary. This is because the sheer size and scale efficiencies are creating systemic challenges. Economic power must be sufficiently distributed to keep markets open and to safeguard competitive structures and processes. Thus, the goal of regulation should be to avoid resorting to the dogmas of “bigger delivers greater efficiencies”. It is necessary to return to the original social market economy values that are at the core of European integration. Only when such concentration of economic power and decentralisation of workers’ powers is avoided can unions fulfil their responsibilities. Just recently, Executive Vice-President Margrethe Vestager emphasised this foundation.¹¹⁶ This can be achieved, for instance, through the following general measures.

1. Preventing the conflict of interest through structural separation or public utility-like treatment

Operating the core infrastructure for e-commerce as a hybrid platform on an upstream intermediation market for businesses (Sellers) and downstream retail markets vis-à-vis its end customers (“shoppers”) as well as offering its own logistics, fulfilment and advertising services have created a strong conflict of interest for Amazon. The same is true for the operation of the AWS cloud infrastructure used by competitors and own services alike. Thus, any regulation of Amazon needs to address the company’s structural conflict of interest along with its ability to cross-leverage competitive advantages across markets.

Structural separation. The most efficient and permanent way of preventing conflicts of interest at Amazon is a structural separation of different Amazon business divisions. UNI believes that the conflict of interest will remain in place until Amazon is barred from engaging in both retail and marketplace activities, as well as operating its own logistics, advertising, and cloud infrastructure solutions. Thus, its various divisions should ideally be spun off into separate companies in order to permanently eliminate conflicts of interest and monopoly leveraging. Most significantly, regulation must impose a strict structural separation of data and ensure that Amazon is unable to subsidise loss-making businesses with profitable ones such as Amazon Web Services.

This is nothing new. The separation of platform/infrastructure and commerce/operation is a standard tool applied in many regulated industries, in particular networks and utilities. It is the best way to make a conglomerate more transparent, which is the very basis to get it back under control.

Structural separation can be imposed in a variety of forms. It can range from the maintenance of separate accounts for different activities to functional or legal separation or

¹¹⁶ She said: “*And digital platforms can also change the way that people work. They can give access to work, and flexibility in doing it; but they can also leave those workers isolated and vulnerable. [...] In 1956, a committee chaired by Paul-Henri Spaak – one of the guiding spirits of this College – prepared the report which laid the groundwork for the Treaty of Rome. The report began bleakly, noting that Europe’s economic position was weakened, and its influence diminished. But the choices which Europe made then – for a social market economy, with fair competition in a European single market – have since made this the best place to live in all of history.*” See Vestager, M., speech of 2 March 2020, “Keeping the EU competitive in a green and digital world”, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en

even to a full ownership unbundling. For example, Article 13 of the Framework Directive¹¹⁷ and other provisions in the field of telecommunications regulation¹¹⁸ prescribed such structural separation. Some targets of such regulation had to spin off telecommunications services into one or more legally independent companies. The same was applied to the energy sector.¹¹⁹ In the railway sector, separate accounts and balance sheets must be kept, on the one hand, for business relating to the provision of transport services by railway undertakings and, on the other, for business relating to the management of railway infrastructure.¹²⁰ However, Member States can also go so far as to “*require the organisation of distinct divisions within a single undertaking or that the infrastructure and transport services shall be managed by separate entities*”.¹²¹

The objective of any of such regulations is to ensure the transparency of internal cost transfers and to prevent companies from implementing unfair cross-subsidies. The regulations on structural separation and separate accounting were intended to counteract distortion of competition through cross-subsidisation or dumping, and to enable the regulators to be able to do their job properly.

Such solutions appear necessary with regard to Amazon as well. It is the most efficient means of avoiding the underlying conflict of interest inherent in Amazon’s overall business model and strategy.¹²² Otherwise, Amazon will always be able to use some of its services and products as a “laboratory” to discover new business opportunities without having to incur the market exploration costs. However, more importantly, in the absence of a separation, it is virtually impossible to effectively enforce additional obligations, such as a “blacklist” of prohibited conduct for any enforcer or competitor. This is due to structural or systemic risks based on the sheer size of Amazon’s business, its diversification and deep vertical integration. These particularities make it virtually impossible to detect Amazon’s “cheating of the system”.

¹¹⁷ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

¹¹⁸ For example, Article 8 of Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP).

¹¹⁹ See Chapter IV of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity; Chapter V of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas; along with all directives repealing or amending such Directives in 2003, 2009, 2012 and 2019.

¹²⁰ See Section III of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community’s railways and later Section II of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.

¹²¹ See Article 6(2) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.

¹²² In this regard, see also *Khan, L.* (fn. 43), p. 793: “*Seeking to prevent the industry structures that create these conflicts of interest may prove more effective than policing these conflicts.*”

In UNI's view, many of Amazon's strategies should be seen as straightforward abuses of Amazon's dominant position. Yet, until today, no competition authority has managed to gather all evidence and data required to issue a prohibition decision against Amazon.¹²³ As one commentator put it, "[i]t is as if Bezos charted the company's growth by first drawing a map of antitrust laws, and then devising routes to smoothly bypass them."¹²⁴

The advantage of a structural approach is also that it decreases the barriers to entry in previously foreclosed markets. Given Amazon's close integration of different business lines, would-be entrants would have to compete at several levels. Reducing such barriers has always been the ultimate goal of regulation.

Treating Amazon like a public utility. UNI is aware that legislators along with enforcers will consider structural separations only as the *ultima ratio*. Since many of the competition concerns related to Amazon arise because of its vertical integration and the inherent conflict of interests, Amazon should *at least* be subject to public utility-like regulation similar to that of regulated network industries (energy, telecoms, postal services, railway). This would ensure that the neutrality of the competitive process is safeguarded. This includes, in particular, privately and publicly enforceable neutrality, non-discrimination, transparency and fair pricing obligations. This also includes a **strict ban on any form of self-preferencing**. This would entail a treatment similar to undertakings falling under Article 106(1) TFEU, that is, undertakings to which Member States have granted special or exclusive rights, which are under additional obligations compared to "merely" dominant undertakings.¹²⁵

Amazon is benefitting enormously from Sellers on its platform. Sellers are the reason why so many consumers came to Amazon in the first place. The greater inventory attracted more consumers because of indirect network effects. Thus, there should be a strict and enforceable obligation to treat Sellers equally, fair and in a transparent manner. Similarly, Amazon should be obliged to treat different Vendors the same and should not favour its Private Label Products over others.

There should be an absolute ban on any form of self-preferencing or tying as regards the winning of the Buy Box (that is, being chosen as default seller for a product). Amazon cannot be allowed to default to the offer that is most profitable for Amazon, for example because it is fulfilled by Amazon or because it is Amazon's own Private Label Product. Instead, Amazon should be obliged to actively "de-bias" the sales process, meaning that

¹²³ It appears as if the Paris Commercial Court is the only court to ever impose a fine (merely €4 million) for Amazon's introduction of abusive clauses in its contracts with third-party vendors, see Rose, M. (Reuters), "Amazon fined 4 million euros in France over competition issues: report", 3 September 2019, <https://www.reuters.com/article/us-amazon-com-france/amazon-fined-4-million-euros-in-france-over-competition-issues-report-idUSKCN1VO2O4>.

¹²⁴ Khan, L. (fn. 43), p. 716.

¹²⁵ Compare Commission, decision of 23 October 2001, C(2001) 3186, *La Poste*, OJ L 120, 7 May 2002, para. 70: "Such a presence on the mail preparation market creates a conflict of interest for *La Poste* since it is led as result of this situation to give preference directly or indirectly to its own subsidiaries and encouraged to abuse its dominant position."

users should be encouraged and enabled to make reasoned choices among the full scope of available offers and retailers.

Similarly, when Amazon is offering fulfilment services to third parties, it should not be allowed to prioritise its own shipments.¹²⁶ Amazon should not force Sellers or Vendors to invest in product advertisements on its sites. However, if product ads are placed, Amazon should not be allowed to reserve prominent positions for its own Private Label Products.¹²⁷ Obviously, any internal exchange of Seller data that enables Amazon to compete more effectively against Sellers on the retail markets must be rigorously prevented through efficient means if there is no structural separation.

In any case, it must be acknowledged that Amazon's service is a service of general interest. Hence, it should be subjected to similar regulatory oversight as other (universal) services. Some of its services (fulfilment, logistics) come very close to services that are regulated in the public interest, such as postal services. However, Amazon is not making sufficient contributions to such service of general interest, since it is cherry-picking only the most profitable parts of it. Overall, this is making the provision of such services more expensive for society. Thus, to re-establish the level playing field, Amazon should be subjected to rules similar to those of similar services.

Banning mergers. It goes without saying that, *a maiore ad minus*, the further strengthening or emergence of new forms of inherently anti-competitive industry structure through mergers must be avoided. Thus, Amazon should be barred from entering any market that it already serves as a platform.¹²⁸

2. Preventing structures that promote cross-subsidisation as a form of leveraging market power across markets

Amazon's diversification has allowed it to use profits from one division to cross-subsidise its expansions in other markets. UNI believes that it is necessary to strictly prevent such cross-subsidisation as a form of leveraging market power across markets. Similar to what has been proposed above with regard to subjecting Amazon to public utility-like regulation, the prohibition of cross-subsidisation in cases of legal monopolies (Art. 106(1) TFEU)¹²⁹ should be applied to systemic platforms such as Amazon. Such prohibition goes hand-in-hand with flanking requirements to increase cost transparency.

¹²⁶ As this apparently happened during the Covid-19 peak in 2020, see *Gärtner, M.* (Amazon Watchblog), "Kritik von Händlern: Kartellamt fordert Stellungnahme von Amazon", 21 April 2020, <https://www.amazon-watchblog.de/kritik/2127-kritik-haendlern-kartellamt-stellungnahme-amazon.html>.

¹²⁷ During the Covid-19 pandemic, Amazon reportedly had begun to reserve certain positions for its own Private Label Products, without bidding, under the heading "featured from our brands", see *Dudley, R.*, "Amazon's New Competitive Advantage: Putting Its Own Products First", 6 June 2020, <https://www.propublica.org/article/amazons-new-competitive-advantage-putting-its-own-products-first>

¹²⁸ *Khan, L.* (fn. 43), p. 793 makes the same argument.

¹²⁹ See *Commission*, decision of 23 July 2004, Case COMP/A.36.568/D3, *Scandlines Svergie*, recital (271): "the Commission recalled that to date, "cross-subsidisation" has only been considered

Cross-subsidisation is the foundation of many problems. Cross-subsidisation between highly profitable business divisions such as Amazon and, for example, its constantly loss-making international retail division must be avoided. Similarly, measuring competition only through price and output on a market-by-market basis must also be avoided. Amazon has been pursuing a strategy of growth over profit across several markets for more than 25 years. It has been rewarded by its investors for such strategy. Predatory pricing became rational for Amazon and was enabled by cross-subsidisation. Cross-subsidisation enabled Amazon's "killer acquisitions". More generally, it is Amazon's ability to cross-subsidise loss-making operations (over a long period of time) that has chilling effects on competition, and prevents competitors from entering any market where Amazon is active, strong or might have an interest.

Disclosure of precise cost structure to regulators. If structural separation is not an option, then other means should be implemented to monitor whether Amazon starts charging prices that are below actual costs. Specific cost data should be mandatorily disclosed to regulators, and accounts must be kept separate to increase price transparency.

Pre-emptive enforcement. Against the background of strong conflicts of interest, it should not be a precondition that any abuse actually occurs, as this is the case under Article 106(1) TFEU.¹³⁰ Regulators should be allowed to apply the principle of precaution where entire industries are at the mercy of a few companies. Otherwise, competition in the market would be structurally weakened over time, until it becomes difficult or impossible to efficiently address competitive concerns. UNI understands that the proposed "new competition tool" is to serve this purpose.

3. Keeping a closer watch on Amazon's behaviour, in particular its ability to demand unjustified benefits

In addition to the more structural concerns described above, Amazon's actual market conduct must be monitored more closely. In particular, general issues concerning the

an abuse in the context of state-supported monopoly rights (in the postal sector, for instance). Outside the context of such monopolies, the extension of a dominant position to another market would normally constitute an infringement only when it weakens or reduces the degree of competition in the subsidised market". Compare also Commission, decision of 20 March 2001, Case COMP/35.141, *Deutsche Post AG*, OJ L 125, 5 May 2001, para. 10: "*To avoid subsidising mail-order parcel services by using revenue from the reserved area, DPAG must earn revenue on this parcel service which at least covers the costs attributable to or incremental to producing the specific service.*" See also Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ C 39, 6 February 1998, pp. 2-18, para. 3.4: "[postal operators to which the Member States have granted special or exclusive rights] *should not use the income from the reserved area to cross-subsidise activities in areas open to competition. Such a practice could prevent, restrict or distort competition in the non-reserved area.*" Such principle similarly applies in the telecommunications sector, compare Commission, Guidelines on the application of EEC competition rules in the telecommunications sector, OJ C 233, 6 September 1991, pp. 2-26, para. 104: "*Subsidizing activities under competition, whether concerning services or equipment, by allocating their costs to monopoly activities, however, is likely to distort competition in violation of Article 86.*"

¹³⁰ See ECJ, Case 553/12 P, judgment of 17 July 2014 – *DEI*, para. 41.

prohibition on demanding unjustified benefits from suppliers of content, products (inventory) and services should be clarified. A closer watch should be kept on Amazon's strategies or mere ability to demand unwarranted commercial advantages (for example, rebates, excessive amounts of data) from service partners and Suppliers. As observed, "*Amazon has a long history of retaliating against suppliers who resist its ever-mounting demands for bigger discounts*".¹³¹

In other words, Amazon's bargaining power needs to be controlled more strictly. Otherwise, Amazon will be allowed to benefit from unjustified benefits (two-fold, namely through rebates and by increasing rivals' costs due to waterbed effects (see above)¹³²). In particular, practices to shift an excessive amount of entrepreneurial risk to Vendors should be prohibited more efficiently. For example, it has been reported that Amazon is demanding concessions from Vendors, including "*forcing the supplier to take on more of the freight cost between warehouses, or to buy more ads on Amazon, in return for remaining a major wholesale partner*".¹³³ Demanding unjustified rebates, the procurement of additional services or excessive fees from logistics partners or Sellers should be prohibited just the same.

Likewise, Amazon must not make the award of placement in the Buy Box dependent on the granting of unrelated benefits to Amazon, such as the procurement of additional Amazon services (for example, fulfilment, shipment or advertising services).

Such prohibitions should apply even in the absence of "dominance" in the sense of Article 102 TFEU when Suppliers or logistics companies are dependent on Amazon because of its strategic significance.¹³⁴

C. Need to consider goals other than purely competition-related goals in ongoing regulation of "Big Tech"

UNI's most pressing concern is that any reform of competition law or regulation of structural or systemic competition concerns will not sufficiently take into account the collateral damage that anti-competitive strategies or forms of market failure bring about for workers.

Societal purposes of regulation. Justifications for regulatory intervention are commonly only based on the identification of "market failures". It appears that the current legislative proposals of the Commission (at III. above) do not depart from this standard. This may risk overlooking other social failures.¹³⁵ UNI submits that it is crucial to implement

¹³¹ Mitchell, S./LaVecchia, O. (fn. 92), p. 23.

¹³² See fn. 90.

¹³³ Kim, E. (fn. 58).

¹³⁴ As a guideline for this, any regulation could be inspired by the current proposal for the amendment of the German Act against Restraints of Competition. According to the proposed Section 19a of the Act, a competition-oriented regulation for "*undertakings with paramount significance for competition across markets*" is to be implemented; this is a threshold below dominance.

¹³⁵ Prosser, T., "Regulation and Social Solidarity", Journal of Law and Society, Vol. 33, No. 3 (September 2006), pp. 364-387, makes the same argument.

regulatory goals in any proposed regulation that specifically prescribe the legislative purpose, including safeguarding a high level and quality of employment. In other words, the protection of workers and their rights should be made a goal of regulation, just as combating market failure and protecting consumer welfare.

Taking non-economic goals into account is characteristic and indispensable for sector-specific regulation. Past regulation of industries that lacked competition likewise foresaw the consideration of goals other than competition. For example, Section 2 of the German Postal Act of 1997 prescribes, *inter alia*, that “*the aim of regulation shall be [...] to meet social requirements*” (Section 2, no. 5 Postal Act). This is based on the EU’s Postal Directive of 1997.¹³⁶ Article 2, no. 19 thereof defines “*essential requirements*” as “*general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services*”. Among these reasons are “*respect for the terms and conditions of employment, social security schemes, laid down by law, regulation or administrative provision and/or by collective agreement negotiated between national social partners*”. Other provisions of the Postal Directive deal with such essential requirements as well.¹³⁷ Since postal services are a labour-intensive business, the legislator foresaw that any regulation purely based on economic considerations would have a devastating impact, because increasing competition could easily be based on the backs of workers. Precisely the same consideration should apply to any regulation of an economic sector that has such a great impact on the everyday life of every citizen, be it as a consumer or as a worker. In any event, most of Amazon’s labour-intensive operations are very similar to postal operations (if not identical).

EU primary law requires accounting for workers’ rights. Primary EU law foresees that action can be taken not only when required by competition policy, but also for purely social policy reasons (provided that considerations of competition policy are taken into account). *A fortiori*, social policy reasons should have an impact on competition policy just as well. Social policy concerns must be actively taken into account when shaping other areas. This is confirmed by Articles 9 and 151(1) TFEU:

Article 9

“In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.”

Article 151(1)

“The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue

¹³⁶ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service.

¹³⁷ Article 9 foresees authorisation procedures to ensure such essential requirements for services falling within and outside the scope of universal service. Article 23 entails the obligation for the Commission to report to the European Parliament on, *inter alia*, “*developments in the sector, particularly concerning economic, social, employment patterns [...]*”.

between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.”

Similarly, Article 3(3) of the Treaty on European Union confirms such reading:

“The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. [...]

It shall combat social exclusion and discrimination, and shall promote social justice and protection, [...] It shall promote economic, social and territorial cohesion, and solidarity among Member States.”

This means that, when drafting regulation supplementing the existing competition rules, the positive impact on workers needs to be taken into account as an ancillary goal. Thus, it should be made an explicit goal of any envisaged regulation under the holistic approach that both UNI and the European Commission advocate.

Consultations of unions. In addition, to ensure the accountability of decisions, unions, and not only “market participants”, should be consulted when competition or regulatory authorities assess the impact of any measure (for example, within the framework of market tests).¹³⁸

VI. Conclusion

UNI considers the ongoing initiatives for regulation of the market power of “Big Tech” players, in particular the “GAFA” group (Google, Amazon, Facebook and Apple), a promising undertaking to ensure that future generations benefit from free and competitive online markets. UNI strongly encourages the Commission to undertake the steps necessary to effectively regulate large online platforms such as Amazon on a market-by-market or company-by-company basis. There are numerous serious competition and social concerns that can only be addressed effectively through targeted regulation.

Such regulatory intervention would allow distorted or failing markets to recover, to the benefit of consumers, businesses and workers alike. It is critical for the European Commission to ensure that any legislative proposal pursues the goals of a social market economy. This includes the direct or indirect strengthening of workers’ rights. Market structures where destructive competition or vertical dependence lead to adverse effects on working conditions and fair wages must be eliminated. Our recommendations are summarised on page 3 above.

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¹³⁸ This means, for example, that unions should always qualify as having “a *sufficient interest*” under provisions such as Article 27(3) of Regulation (EC) 1/2003.