



Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

20 April 2023 *

(Appeal – Competition – Article 102 TFEU – Abuse of dominant position – Online sales – Regulation (EC) No 773/2004 – Article 2(1) – European Commission decision to initiate an investigation – Territorial scope of the investigation – Exclusion of Italy – Allocation of competence between the Commission and the competition authorities of the Member States – Regulation (EC) No 1/2003 – Article 11(6) – The competition authorities of the Member States being relieved of their competence – Protection against proceedings conducted in parallel by the competition authorities of the Member States and by the Commission – Action for annulment – Act not open to challenge – Act not producing legal effects vis-à-vis third parties – Preparatory act – Inadmissibility)

In Case C-815/21 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 December 2021,

Amazon.com Inc., established in Seattle (United States),

Amazon Services Europe Sàrl, established in Luxembourg (Luxembourg),

Amazon EU Sàrl, established in Luxembourg,

Amazon Europe Core Sàrl, established in Luxembourg,

represented by A. Komninos, dikigoros, and G. Tantulli, abogado,

appellants,

the other parties to the proceedings being:

European Commission, represented by B. Ernst, T. Franchoo, G. Meessen and C. Sjödin, acting as Agents,

defendant at first instance,

supported by:

Autorità Garante della Concorrenza e del Mercato, established in Rome (Italy), represented by P. Gentili, avvocato dello Stato,

* Language of the case: English.

intervener in the appeal,

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún, President of the Chamber, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By their appeal, Amazon.com Inc., Amazon Services Europe Sàrl, Amazon EU Sàrl and Amazon Europe Core Sàrl (together, ‘Amazon’) seek to have set aside the order of the General Court of the European Union of 14 October 2021, *Amazon.com and Others v Commission* (T-19/21, EU:T:2021:730; ‘the order under appeal’), by which the General Court dismissed as inadmissible their action for annulment in part of Commission Decision C(2020) 7692 final of 10 November 2020 initiating proceedings under Article 102 TFEU in Case AT.40703 – Amazon – Buy Box (‘the decision at issue’).

Legal context

Regulation (EC) No 1/2003

- 2 Recitals 17 and 32 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1) state that:

‘(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

...

(32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.'

3 Article 11(6) of that regulation provides:

'The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles [101 and 102 TFEU]. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.'

Regulation No 773/2004

4 Recital 10 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ 2008 L 171, p. 3) ('Regulation No 773/2004'), provides:

'In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.'

5 Article 2(1) of Regulation No 773/2004 states:

'The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation [No 1/2003] at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation, a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.'

Background to the dispute

6 The background to the dispute was set out as follows in paragraphs 1 to 5 of the order under appeal:

'1 The applicants ... form part of the Amazon group. In particular, Amazon is active on the internet and carries out, inter alia, online retail transactions and the provision of various online services.

2 On 10 November 2020, the European Commission adopted [the decision at issue].

3 In the Commission's view, certain of Amazon's commercial practices could artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services.

- 4 The Commission took the view that, if established, the practice in question may be contrary to Article 102 TFEU.
- 5 In the decision at issue, the Commission stated that the investigation would cover the whole of the European Economic Area (EEA), with the exception of Italy, which it justified, in the press release accompanying the adoption of that decision, by the fact that the Italian competition authority had begun to investigate partially similar problems in April 2019, focusing on the Italian market.'

The proceedings before the General Court and the order under appeal

- 7 By application lodged at the General Court Registry on 19 January 2021, Amazon brought an action for the partial annulment of the decision at issue, in so far as it excludes Italy from the scope of the investigation and the legal consequences of Article 11(6) of Regulation No 1/2003.
- 8 By separate document lodged at the Court Registry on 29 March 2021, the Commission pleaded the inadmissibility of that action, arguing, *inter alia*, that the decision at issue did not constitute a challengeable act, within the meaning of Article 263 TFEU, since it did not produce any binding legal effect capable of affecting Amazon's interests by bringing about a distinct change in Amazon's legal position. Amazon lodged its observations on that plea of inadmissibility on 14 May 2021.
- 9 By the order under appeal, the General Court dismissed Amazon's action as inadmissible on the ground that the decision at issue produced only the ordinary effects of a procedural step and therefore, apart from the procedural aspect, did not affect Amazon's legal position.
- 10 In addition, in accordance with Article 144(3) of its Rules of Procedure, the General Court decided that there was no need to rule on the applications to intervene, including the application made by the Autorità Garante della Concorrenza e del Mercato (National Competition Authority, Italy) ('the AGCM').

Procedure before the Court and forms of order sought

- 11 By document lodged at the Court Registry on 21 December 2021, Amazon brought the present appeal.
- 12 By document lodged on 13 April 2022, the AGCM applied, on the basis of the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union and on the basis of Articles 129 and 130 of the Rules of Procedure of the Court of Justice, for leave to intervene in the appeal in support of the form of order sought by the Commission.
- 13 By order of the President of the Court of 14 July 2022, *Amazon.com and Others v Commission* (C-815/21 P, not published, EU:C:2022:596), that application was granted. In so far as that application was submitted after the expiry of the period referred to in Article 130 of those rules, but before the decision to open the oral part of the procedure, the AGCM was, in accordance with Article 129(4) of those rules, granted leave to intervene in support of the form of order sought by the Commission and to submit its observations at the hearing, if it took place.

- 14 By its appeal, Amazon claims that the Court should:
- set aside the order under appeal;
 - dismiss the plea of inadmissibility raised by the Commission before the General Court; and
 - refer the case back to the General Court in order for that court to rule on the substance.
- 15 The Commission contends that the Court should:
- dismiss the appeal; and
 - order Amazon to pay all of the costs incurred in the present proceedings.

The appeal

- 16 In support of its appeal, Amazon raises a single ground of appeal divided into three parts, alleging, first, infringement by the General Court of Article 263 TFEU, secondly, misinterpretation of Article 11(6) of Regulation No 1/2003 and, thirdly, that the General Court's reasoning is based on secondary erroneous and inoperable findings.

The second part of the single ground of appeal

Arguments of the parties

- 17 By the second part of the single ground of appeal, which it is appropriate to examine in the first place, Amazon submits that, in the order under appeal, the General Court misinterpreted Article 11(6) of Regulation No 1/2003.
- 18 Thus, in paragraphs 28 to 50 of the order under appeal, the General Court applied a paradoxical interpretation of that provision by stating, on the one hand, in paragraph 41 of that order, that that provision is intended to protect undertakings from parallel proceedings brought by the competition authorities of the Member States and the Commission, while acknowledging, on the other hand, that the Commission may at its discretion refuse that protection.
- 19 That incorrect interpretation stems from a confusion of the concepts of 'geographical market', 'geographical scope' and 'geographical scope of the proceedings' in paragraphs 26 to 28 of the order under appeal. In that regard, Amazon submits that the decision at issue did not define any 'geographical market' but merely excluded Italy from the territorial scope of the Commission's investigation for the sole purpose of circumventing the obligations under Article 11(6) of Regulation No 1/2003.
- 20 Lastly, Amazon submits that, in paragraph 28 of the order under appeal, the General Court makes the protection afforded by Article 11(6) of Regulation No 1/2003 subject to the Commission's discretion. However, as a matter of principle, in no field of EU law can the administration, through a discretionary choice, remove a protection accorded by law.
- 21 The Commission disputes the merits of those arguments.

Findings of the Court

- 22 As regards the interpretation of Article 11(6) of Regulation No 1/2003, it should be noted that, in paragraph 23 of the order under appeal, the General Court stated that a measure by which the Commission initiates proceedings under Article 102 TFEU produces, in principle, no more than the ordinary effects of any procedural step and, apart from the procedural aspect, does not affect the legal position of the applicants. It therefore considered, in paragraph 38 of that order, that, in the present case, the decision to exclude Italy from the scope of the proceedings initiated by the Commission following the adoption of the decision at issue produced no more than the ordinary effects of any procedural step and, apart from the procedural aspect, did not affect the legal position of Amazon.
- 23 It added, in paragraph 39 of that order, that Amazon's claims that the decision at issue, although of a procedural nature, produced legal and binding effects, in that the exclusion of Italian territory from its scope deprived it of the protection against parallel proceedings provided for in Article 11(6) of Regulation No 1/2003, did not call that conclusion into question.
- 24 Thus, the General Court, after noting, in paragraph 41 of the order under appeal, that the competition authorities of the Member States being relieved of their competence under the latter provision made it possible to protect undertakings from parallel proceedings brought by those authorities and the Commission, held, in paragraphs 45 to 48 of that order, that that protection did not imply any right, for an undertaking, to have a case dealt with in its entirety by the Commission. Consequently, the General Court held, in paragraph 49 of that order, that Amazon was not justified in claiming that it had been deprived, by the part of the decision at issue in dispute, of the protection provided for in Article 11(6) of Regulation No 1/2003, since that protective effect does not imply that the Commission is obliged to initiate proceedings in order to deprive the competition authorities of the Member States of their competence to apply Articles 101 and 102 TFEU.
- 25 Contrary to what Amazon claims, such an interpretation of Article 11(6) of Regulation No 1/2003 is not vitiated by error.
- 26 Under the first sentence of Article 11(6) of Regulation No 1/2003, the competition authorities of the Member States lose their competence to apply Articles 101 and 102 TFEU in cases where the Commission initiates proceedings in order to adopt one of the decisions referred to in Chapter III of that regulation which are aimed at finding an infringement of Articles 101 and 102 TFEU, requiring the undertakings in question to bring those infringements to an end, ordering interim measures following a *prima facie* finding of such infringements, making binding the commitments offered by undertakings, or finding Articles 101 and 102 TFEU to be inapplicable.
- 27 It follows that, where, pursuant to the first sentence of Article 11(6) of Regulation No 1/2003, the Commission initiates proceedings against one or more undertakings for an alleged infringement of Article 101 or 102 TFEU, the competition authorities of the Member States are relieved of their competence to bring proceedings against the same undertakings for the same, allegedly anticompetitive, practices occurring on the same product and geographical market or markets during the same period or periods (judgment of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139, paragraph 30).

- 28 Such removal of competence is justified by the fact that the competition authorities of the Member States are empowered to apply the EU competition rules in parallel with the Commission, with the result that, as is apparent from recital 17 of Regulation No 1/2003, the objective of that regulation is, inter alia, to ensure consistent application of the EU competition rules and to ensure that the network of the public authorities responsible for implementing those rules is managed in the best possible way. Furthermore, since the parallel application of those rules cannot be at the expense of undertakings, the fact that the competition authorities of the Member States are relieved of their competence also makes it possible to protect those undertakings from parallel proceedings brought by those authorities and the Commission (see, to that effect, judgment of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139, paragraph 32 and the case-law cited).
- 29 It should be recalled that a decision to initiate proceedings, within the meaning of Article 2(1) of Regulation No 773/2004, does not have the effect of depriving the addressees of that decision of their procedural rights. On the contrary, those proceedings were designed specifically to enable the undertakings concerned to communicate their views and to provide the Commission with the fullest information possible before it adopted a decision affecting their interests. It is therefore intended to create procedural guarantees for the benefit of those undertakings and, as is apparent from recital 32 of Regulation No 1/2003 and recital 10 of Regulation No 773/2004, to accord undertakings the right to be heard by the Commission (order of 29 January 2020, *Silgan Closures and Silgan Holdings v Commission*, C-418/19 P, not published, EU:C:2020:43, paragraph 48).
- 30 Therefore, the line of argument put forward by Amazon in support of this part of the single ground of appeal that Article 11(6) of Regulation No 1/2003 affords undertakings protection against parallel proceedings on the part of the competition authorities of the Member States and the Commission, protection which the Commission deprived it of by unlawfully excluding Italy from the territorial scope of the investigation opened by the decision at issue, is based on a manifestly incorrect interpretation of that provision.
- 31 The protection afforded by Article 11(6) of Regulation No 1/2003 applies only in the event of parallel proceedings brought by the competition authorities of the Member States and the Commission against the same undertakings in respect of the same allegedly anticompetitive conduct occurring in the same product or geographical markets and over the same period or periods.
- 32 As the Commission rightly points out in its response, that protection depends on the scope of the decision to initiate proceedings under Article 101 TFEU or Article 102 TFEU.
- 33 Consequently, undertakings cannot avail themselves of that protection if the Commission has not initiated proceedings or has not initiated proceedings in respect of a given territory.
- 34 In the present case, since the territorial scope of the proceedings initiated in accordance with the decision at issue did not include Italy, the protection against parallel proceedings provided for in Article 11(6) of Regulation No 1/2003 could not apply.
- 35 Furthermore, as the General Court stated without erring in paragraph 45 of the order under appeal, that protection against parallel proceedings does not imply any right for an undertaking to have a case dealt with in its entirety by the Commission.

- 36 To maintain, as Amazon does, that a Commission decision to initiate proceedings with a view to adopting a decision pursuant to the provisions of Chapter III of Regulation No 1/2003 must necessarily cover the whole of the EEA is such as to deprive that institution of the broad discretion which it enjoys when adopting such a decision, in accordance with Article 2(1) of Regulation No 773/2004.
- 37 It follows from the foregoing that the General Court did not err in its interpretation of Article 11(6) of Regulation No 1/2003. Consequently, Amazon's argument that it confused the concepts of 'geographical market', 'geographical scope' and 'geographical scope of the proceedings' is ineffective.
- 38 Therefore, the second part of the single ground of appeal must be rejected as unfounded.

The first part of the single ground of appeal

Arguments of the parties

- 39 Amazon submits that the General Court infringed the first and fourth paragraphs of Article 263 TFEU by wrongly concluding that the action for annulment was inadmissible on the ground that the decision at issue did not produce legal effects vis-à-vis Amazon.
- 40 The effects and legal character of the decision at issue should have been determined in the light of its purpose. Amazon criticises the General Court for having merely held, in accordance with the case-law, that a measure initiating proceedings under Article 102 TFEU produces, in general, only the ordinary effects of any procedural step and, apart from the procedural aspect, does not affect the legal position of the undertakings to which the decision is addressed, without carrying out a specific analysis of that decision.
- 41 According to Amazon, if the General Court had carried out an analysis of the substance of that decision, it would have found that that decision did not merely initiate proceedings, but had an independent legal effect by unlawfully depriving it of the protection against any parallel proceedings brought by two competition authorities against the same undertaking, provided for in Article 11(6) of Regulation No 1/2003.
- 42 The Commission disputes Amazon's line of argument, contending, primarily, that the first part of the single ground of appeal is inadmissible, in that the contested elements of the order under appeal are not specified, and, in the alternative, that that part is unfounded.

Findings of the Court

- 43 As regards the admissibility of the present part, it is sufficient to note that, contrary to what the Commission claims, Amazon identified with sufficient precision the contested elements of the order under appeal to which its arguments relate. It is clear from the appeal that Amazon criticises the General Court for having held that the decision at issue was a measure initiating proceedings under Article 102 TFEU which produced only the ordinary effects of any procedural step and, apart from the procedural aspect, did not affect the legal position of the undertakings to which the decision was addressed, without carrying out a specific analysis of that decision.

- 44 It follows that the first part of the single ground of appeal is admissible.
- 45 As regards the substance, it is expressly stated in paragraphs 27 and 28 of Amazon’s appeal that Amazon claims that, in the present case, the General Court infringed Article 263 TFEU by confining itself to the formal presentation of the decision at issue without carrying out a substantive analysis which would have made it possible to find that that decision did not merely initiate proceedings with a view to adopting a decision pursuant to the provisions of Chapter III of Regulation No 1/2003, in accordance with Article 2(1) of Regulation No 773/2004, but that it produced a separate legal effect, in that it brought to an end the protection provided for in Article 11(6) of Regulation No 1/2003.
- 46 That line of argument is based on the premiss that Amazon is justified in relying on the protection provided for by that provision. It follows from the examination of the second part of the single ground of appeal that such a premiss is incorrect.
- 47 Accordingly, the first part of the single ground of appeal, which is based entirely on that incorrect premiss, must be rejected as unfounded.

The third part of the single ground of appeal

Arguments of the parties

- 48 By the third part of its single ground of appeal, directed against paragraphs 32 to 50 of the order under appeal, Amazon submits that that order is based on ‘secondary erroneous and inoperable findings’. First of all, the General Court was wrong to refer, in its reasoning, to Amazon’s arguments alleging that it might have to defend itself before two separate competition authorities, in so far as the General Court failed to take account of the infringement of Amazon’s rights. Next, the provisional nature of the decision at issue is irrelevant for the purposes of the present action. Lastly, it is wrong to treat the application in the same way as a request by the Commission to initiate proceedings on the Italian market.
- 49 The Commission disputes those arguments.

Findings of the Court

- 50 In that regard, it should be noted that, since the first two parts of the single ground of appeal have been rejected, the General Court’s conclusion that Amazon’s action was inadmissible cannot be called into question by the third part of that ground of appeal, by which Amazon merely disputes the General Court’s ‘secondary findings’ in so far as they are erroneous and ineffective, with the result that the third part of that ground of appeal must be rejected as ineffective.
- 51 In the light of the foregoing considerations, each of the parts of the single ground of appeal must be rejected and, accordingly, the appeal must be dismissed in its entirety.

Costs

- 52 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to the costs. Article 138(1) of those rules, applicable to appeal proceedings pursuant to Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 53 Since the Commission has applied for Amazon to be ordered to pay the costs and since Amazon's appeal is to be dismissed, Amazon must be ordered to pay the costs.
- 54 In accordance with Article 140(3) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) of those rules, the Court may order an intervener other than those referred to in Article 140(1) and (2) thereof to bear his or her own costs. In the present case, the AGCM must be ordered to bear its own costs relating to the appeal.

On those grounds, the Court (Seventh Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Amazon.com, Inc., Amazon Services Europe Sàrl, Amazon EU Sàrl and Amazon Europe Core Sàrl to bear their own costs and to pay the costs incurred by the European Commission;**
- 3. Orders the Autorità Garante della Concorrenza e del Mercato (National Competition Authority, Italy) to bear its own costs in relation to the appeal proceedings.**

Arastey Sahún

Wahl

Passer

Delivered in open court in Luxembourg on 20 April 2023.

A. Calot Escobar
Registrar

M.L. Arastey Sahún
President of the Chamber