



Case Summary

17 July 2019

Sector: Online sales

Ref: B2 - 88/18

Date of Decision: 17 July 2019

The Bundeskartellamt has closed its abuse of dominance proceedings 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.de. Amazon has amended the general terms of business for sellers on its marketplaces objected to by the Bundeskartellamt and promised further alterations to its marketplace operation to dispel competition concerns about the practices contested. The amendments will achieve considerable improvements for marketplace sellers without adversely affecting the interests of customers on the marketplace, in particular as regards service quality. Amazon will adjust its terms of business (Business Solutions Agreement - BSA) not only for the German marketplace amazon.de, but for all European marketplaces (amazon.co.uk, amazon.fr, amazon.es, amazon.it) and marketplaces worldwide including those in North America and Asia.

Complaints by sellers:

In November 2018, following a large number of complaints from sellers, the Bundeskartellamt initiated abuse of dominance proceedings against Amazon to examine its terms of business and practices towards sellers on its German marketplace amazon.de (see Bundeskartellamt press release of 29 November 2018). It addressed various aspects of Amazon's general terms of business as specified, in particular, in its Business Solutions Agreement "BSA" as well as certain practices towards sellers on Amazon's marketplaces. In addition to the numerous, partially anonymous, statements and complaints by Amazon sellers, the Bundeskartellamt also considered information from newspaper articles, associations and internet fora containing similar complaints in its examination. Ultimately, objections were made to several abusive rules and practices used by Amazon in its operation of amazon.de. These include: the lack of transparency of the terms of business; the unexpected termination and blocking of sellers accounts, which in some cases was either not substantiated or substantiated only by standard phrases; the lack of possibilities for

sellers to enforce a contractual obligation on Amazon and clarify matters of dispute; the disadvantage of sellers in customer reviews; the obligation for sellers to transfer the rights to use product information (especially images) to Amazon; the obligation for sellers to bear the costs of obviously unjustified customer returns and various other rules and practices on the marketplace.

The Bundeskartellamt did not take up any further complaints by sellers, especially issues regarding the use of marketplace data, ranking and Buy Box. These are the subject of examinations conducted by the European Commission. Complaints by so-called vendors, i.e. suppliers of Amazon's retail business (Amazon Retail), were not covered by the proceedings.

The amendments in detail:

- Transparency and contract amendments: Up to now it was difficult for sellers to see which conditions applied to them on the Amazon platform. The limited transparency and searchability of the terms of business were not treated by the Bundeskartellamt as a specific accusation of abuse but were indirectly objected to in the examination of other aspects. All Amazon's terms of business will now be easier to find, in particular all its programme guidelines will be accessible via a hyperlink in the BSA. In future any changes to the conditions in its contracts and programmes will be announced with 15 days' notice. Furthermore, notifications from Amazon can be received in a documentable manner. Amazon will at least adhere to a comparable standard of email communication in German-speaking countries.
- Choice of law and court of jurisdiction: Until now sellers wishing to take action against Amazon were obliged to file appeals in Luxembourg via lawyers there because Luxembourg was given as the only court of jurisdiction in Amazon's terms of business for the European marketplaces. Amazon has now abandoned this exclusivity of court of jurisdiction for Europe both in its terms of business for its marketplace (BSA) as well as in its terms of payment (Amazon Payments Agreement "APE"). Under certain conditions domestic courts can be the competent court of jurisdiction in future. Agreements on exclusive courts of jurisdiction are principally admissible under international private law even if there is no other connection to the court of jurisdiction. However, the authority had concerns that this would hinder marketplace sellers from enforcing their rights against Amazon by recourse to the courts. This would create additional costs for the sellers for engaging Luxembourg lawyers and for translations. On the other hand in view of the obligatory application of Luxembourg law Amazon can justify this exclusivity with objective reasons, i.e. that

standard legal conditions should apply to sellers on all Amazon marketplaces in Europe. In addition, a subsequent amendment to applicable law would be problematic in ongoing contractual relationships and would not be conducive to legal certainty. Amazon's requirement that Luxembourg law is relevant for business relations will thus still apply.

- Liability and exemption rules: Up to now the BSA has contained a very comprehensive exclusion of liability and far-reaching limitations of liability in Amazon's favour. In contrast, the rules provided for extensive liability for the sellers and the obligation to indemnify Amazon from any claims from third parties. Due to the new rules for European marketplaces Amazon's exclusion of liability will be significantly limited in future and the exemption obligation to the disadvantage of the sellers more narrowly defined. In the future Amazon will be liable to the same extent as sellers for intent or gross negligence and for any breach of major contractual obligations. The exemption obligation of the sellers will no longer apply to merely alleged violations of intellectual property rights or contractual obligations but only if concrete indications exist. Amazon also clarified in its final letter to the Bundeskartellamt that within Fulfilment by Amazon (FBA) a right to indemnification with regard to units (i.e. returned products) of the seller only exists if Amazon proves that the rejected unit is in fact the product sent by the seller.

At the Bundeskartellamt's instigation the current liability and exemption rules which were previously greatly to the sellers' disadvantage, will therefore be significantly eased and more balanced in Europe. This will take more account of European minimum standards for Business to Business (B2B).

- Termination and blocking of accounts: Until now Amazon reserved an unlimited right to immediately terminate contractual relations with sellers or block them as well as the right to immediately block sellers' payment accounts without justification. Numerous sellers complained about the unsubstantiated and surprising cancellations and resulting loss of turnover.

In the future the ordinary termination of an account will require 30 days' notice. In the case of an extraordinary termination (based on alleged legal infringements by a seller) and the blocking of a seller's account, Amazon is now obliged to inform the seller and provide reasons for such measures except where this would help fraudulent or unlawful sellers to see through the company's control systems. Due to the many breaches of law and attempted fraud on the Marketplace, Amazon must still have the possibility to act quickly, but still has to give reasons for its actions.

Practical significance: In 2018 Amazon permanently blocked more than 250,000 seller accounts on its German Marketplace and temporarily blocked over 30,000 accounts. Amazon indicated fraud as the main reason for account blocking but also the violation of industrial property rights and product counterfeiting. The forthcoming provisions of the European Regulation on promoting fairness and transparency for business users of online intermediation services (“Platform to Business Regulation”) will also play a role in future.

- Rights of use of product information and parity requirement: Until now sellers had to irrevocably grant Amazon as the marketplace operator and its affiliated companies very extensive rights to use their product material (e.g. product images, descriptions). In accordance with the so-called parity requirement they also had to provide product material of the same high quality as the one that they use in other sales channels. According to the Bundeskartellamt’s preliminary assessment the sellers could be pressurized into providing product material for which they cannot grant the required extensive rights of use. If entitled third parties were to make claims, the sellers would also be obliged to exempt Amazon from such claims. The parity requirement could also make it difficult for sellers to set themselves apart from Amazon Marketplace with higher quality or more specific product information in other sales channels which they use, i.e. in their own online shops.

The granting of rights of use of product material will be more clearly and narrowly defined in the future. The transfer of rights will be limited to the duration of the (original or derived) property rights of the seller and in terms of content to the possible use by Amazon. Furthermore the parity requirement, whereby material in the highest quality used in other sales channels has to be provided, will not apply in the future, including the indirect restriction on sellers to publish more extensive or higher quality product material on their own shop websites. However, Amazon will still be able to impose requirements with regard to the quality of presentation on its Marketplace. This will enable manufacturers and sellers to make their own websites more attractive in terms of quality (e.g. images, content) and prevent a potentially stronger pull effect to Amazon Marketplace due to a standardised product description across sales channels. In particular, possibilities to enter into effective competition with large internet platforms on price and quality are to be kept open. The Bundeskartellamt’s proceedings to abolish price parity on Amazon Marketplace in 2012/2013 ([press releases of 26 November 2013](#)) and against the best price clauses of hotel portals (see HRS and booking.com cases) already served this purpose.

- Returns and reimbursements: Amazon’s extremely customer-friendly rules on returns and reimbursements for customers will remain unaffected by the amendments. However,

sellers complained that they had to bear all the costs, even in the case of obviously unjustified or even fraudulent customer returns and the other consequences of a wrong decision by the marketplace operator. Until now Amazon has had sole and final competence for deciding whether to accept returns through Fulfilment by Amazon (FBA) and claims for an A to Z guarantee refund by the customer.

In future more consideration will be given to the interests of the sellers in their internal relationship with Amazon. For example, those sellers using FBA will now be able to demand that items returned to Amazon be returned to them and object to Amazon's reimbursement decision within 30 days. However, in the course of the return procedure Amazon cannot always allocate each returned product to its respective seller. In its final letter to the Bundeskartellamt Amazon clarified that in the case of an objection the refund claim against the seller will only be asserted if Amazon proves that the product in question was in fact the product supplied by the seller. In the internal relationship to the seller Amazon bears the refund risk in that respect. The practice on Amazon Marketplace in respect of returns and reimbursements for customers will remain unaffected by this. The sellers cannot recover damages from customers. One of the reasons for the attractiveness of online shopping for consumers is Amazon's generous refund and reimbursement rules, in particular its A to Z guarantee. In its internal relationship with the seller Amazon's "exclusive discretion" will no longer be the sole factor but sellers might be entitled to compensation from Amazon.

- Seller ratings/product reviews: On Amazon Marketplace customers can find many reviews of sellers by other customers (so-called seller ratings) and of products (so-called product reviews or customer reviews).

The sellers consider themselves at a disadvantage in respect of seller ratings because Amazon is not rated as a seller itself. They complain that they face disadvantageous consequences from negative seller ratings (in the presentation of their offers on the website and in the ranking list and the Buy Box) whereas no seller rating is requested after a purchase transaction from Amazon Retail. However, Amazon has asserted that it does not prioritise its own retail business over third-party sellers. The question as to whether reviews can influence the ranking of sellers, including the Buy Box, is addressed by the EU Commission's current inquiry against Amazon.

With regard to product reviews, sellers have criticised that reviews of their products obtained from external providers - so-called review clubs - are no longer posted or removed

from the platform whereas reviews generated by Amazon itself via its own “Vine” rating programme continue to be published. Although the reviewers are not directly paid, they receive the test product free of charge. As the Vine programme was previously only available to so-called vendors, i.e. suppliers of Amazon Retail, the authority saw marketplace sellers at a disadvantage and the programme as rerouting the supply flow towards Amazon Retail. This is particularly true for new products for which there are as yet no other reliable customer reviews e.g. for verified purchases. At the Bundeskartellamt’s instigation Amazon will promptly make its Vine rating programme available to those marketplace sellers which own a brand name or representatives of brand name owners and gradually increase the necessary capacities. Amazon will also launch its “Early Reviewer” review programme in Europe. Here sellers will be able to register new products for which Amazon will ask customers to provide reviews after they have purchased a product against a small remuneration. Amazon also stated that the company was preparing to introduce further programmes to assist third-party sellers e.g. with the translation of customer reviews in other languages.

The Bundeskartellamt sees a considerable risk of the abusive, false and manipulative use of customer reviews, which disadvantages both customers as well as competing sellers. Amazon has shown a great and justified interest in acting against such non-authentic reviews (“fake reviews”). The authority has therefore refrained from making further requirements regarding the rules for product reviews and intends to await the effects of further amendments and the results of its sector inquiry into “online user reviews” (see press release of 23 May 2019).

- European delivery schemes: The Bundeskartellamt criticised the fact that the delivery schemes could have enabled Amazon to access marketplace sellers’ inventories in logistics centres both in Germany and abroad, and to sell them via its own retail business. Amazon, however, could eliminate the Bundeskartellamt’s competitive concerns by explaining how it actually implemented the schemes and how sellers benefited from this.
- Confidentiality: Amazon implemented very strict regulations with regard to public statements by sellers. Sellers were in particular required to seek Amazon’s prior written approval when wishing to make a public statement. Amazon has now ended this practice. Following a request by the Bundeskartellamt, Amazon also abandoned its plans to oblige sellers to inform Amazon in the event that public authorities were contacted. The Bundeskartellamt attaches great importance to granting all economic actors access to government authorities in general and competition authorities in particular.

Assessment:

The Bundeskartellamt's overall assessment is that in view of the improvements Amazon has committed to, in particular with regard to the general terms and conditions for its marketplace business, it would not be appropriate to continue its abuse of dominance proceedings. Amazon's concessions eliminate to a large extent the Bundeskartellamt's abuse concerns in these proceedings. What is more, the adjustment of Amazon's terms and conditions worldwide as a result of the rapid conclusion of the proceedings based on the improvements achieved quickly strengthens the sellers' position towards Amazon. Amazon undertook to keep the Bundeskartellamt informed of potential future modifications of its terms and conditions. The Bundeskartellamt will thus be able to monitor compliance with the concessions and possible modifications. In the event that Amazon does not comply with its concessions, also with regard to the improved opportunities for obtaining and publishing verified product reviews, the Bundeskartellamt can reinstate the abuse proceedings.

Legal basis:

The abuse of dominance proceedings are primarily based on German abuse control regulations, with particular regard to provisions and case-law on qualitative exploitative abuse (Section 19(1) (2), nos. 2 and 3 GWB) and the so-called "Anzapfverbot", i.e. the prohibition to demand unjustified benefits from suppliers (Section 19(2) no. 5 GWB). For some of the accusations a potential violation of the regulation on exclusionary abuse (Section 19(2) no. 1 GWB) was taken into consideration as well. An application of European competition law was also considered.

Pursuant to Federal Court of Justice case-law (cf. judgment of 6 November 2013 - KZR 61/11, *VBL-Gegenwert I*, openJur 2013, 44268, judgment of 7 June 2016 - KZR 6/15, *Pechstein*, openJur 2016, 7218) and the Bundeskartellamt's decisional practice (cf. decision of 6 February 2019, B6-22/19, *Facebook*), inappropriate business terms imposed by a dominant company can constitute exploitative abuse based on qualitative considerations. Exploitative abuse exists if the business terms no longer reflect a balance of interests, which is examined by weighing interests considering GWB assessments and other potentially applicable legal provisions from areas other than antitrust law. Violations of legal provisions other than antitrust norms are in any case deemed exploitative if they also contradict antitrust considerations. With respect to the relevant law on general terms and conditions of business, it has to be considered that these provisions have been set to protect the involved parties' fundamental rights by preventing one party from unilaterally

determining the terms of a contract and thus eliminating the other parties' right to self-determination (Federal Court of Justice judgment of 7 June 2016 - KZR 6/15, *Pechstein*, openJur 2016, 7218, para. 60ff.). On this basis, not every clause of the terms and conditions that is potentially to the disadvantage of the sellers, or possibly even very burdensome for them, is objectionable under antitrust law. Rather, it was decisive whether, on the basis of an overall assessment, the application of the terms and conditions in question extremely restricted the sellers in their competitive activity on the marketplace or even made it impossible, particularly due to a lack of opportunities to enforce compliance by Amazon with its main contractual obligations. Whenever Amazon's imposition of such business terms could be considered as a request for benefits for no objective reason, a violation of the prohibition to demand unjustified benefits from suppliers ("Anzapfverbot") was also considered.

Allegations regarding the cancellation and blocking of seller accounts, rights of use and parity requirements, product reviews and seller ratings or European delivery schemes were i.a. reviewed under exclusionary abuse considerations. This was based on the preliminary assumption that Amazon as the operator of the marketplace could use the business terms under review to improve the position of Amazon Retail on the corresponding retail markets (e.g. by limiting the Vine programme to Amazon Retail suppliers). In some cases it was also relevant that the former rules potentially increased a pull effect towards Amazon marketplace to the detriment of other sales channels (e.g. due to uniform product descriptions across sales channels as stipulated in the parity requirement).

The proceedings:

The abuse of dominance proceedings were concluded within seven months as they were well prepared and Amazon was willing to cooperate.

During the proceedings the Bundeskartellamt maintained close contact with the European Commission, which in particular is currently examining Amazon's collection and use of transaction data under European competition law. The Commission is taking a close look at Amazon's use of data and its effects on marketplace sellers, in particular on Amazon's ranking, including the Buy Box.

The Bundeskartellamt has also exchanged information on the proceedings with several national competition authorities in and outside of Europe. The Bundeskartellamt also held intensive discussions in particular with the competition authorities in Austria (Bundeswettbewerbsbehörde) and Luxembourg (Conseil de la Concurrence), because they are also conducting abuse proceedings and investigations against Amazon.

Amazon:

Amazon is an international sales and service company. Its parent company “Amazon.com Inc.” is headquartered in Seattle, USA. The group’s turnover has been marked by very significant and continuous growth for many years, reaching approx. 198 billion euros worldwide in 2018, of which approx. 41 billion euros were generated in Europe and approx. 17 billion euros were generated in Germany. Germany is Amazon’s most important market outside the United States. Its German Amazon.de website generates Amazon’s second-largest sales volume after its US website Amazon.com. Amazon mostly generated its sales in the online product retail business (Amazon Retail). Amazon also generates revenues from services, namely by providing online marketplace services (fees and commission from third-party sellers), by offering online cloud services (AWS = Amazon Web Services) and as a streaming service provider (subscription services).

Amazon operates online marketplaces for general goods worldwide. While all the marketplaces basically operate in the same way, the terms and conditions for the corresponding customer markets vary according to region. Customers use the Amazon marketplaces free of charge. By paying a flat rate sum (“Prime”), customers are entitled to special customer services for their purchases on the marketplace (in particular free delivery) and better terms and conditions for other services (e.g. media streaming services). Marketplace sellers pay a sales commission depending on the goods category they sell (often 15%) and, in some cases, a fee for using the marketplace.

Size of the amazon.de marketplace: In 2018 more than 300 million different items (ASIN) were offered on amazon.de and approx. 1.3 billion products were sold. Of all five European marketplaces the German marketplace accounts for 40% - 50% percent of the sales volume, followed by the British and then the other three marketplaces (amazon.fr, amazon.es, amazon.it).

Amazon.de customers: Of the 37 million customers who purchased at least one product on the German marketplace in 2018, over 80% were from Germany and 5 - 10% from Austria. Goods purchased from the amazon.de marketplace are normally shipped to German addresses. More than 95% of the total volume of sales on amazon.de is sold to German or Austrian customers.

While clearly less than 50% of the (end) customers on amazon.de are Prime members, they account for clearly more than 50% of the total marketplace volume of sales.

Third-party sellers on amazon.de: 40-45% of the volume of sales on amazon.de was achieved by Amazon's own retail business and 55-60% was achieved by more than 300,000 third-party sellers. Considering the volume of sales of third-party sellers on amazon.de, 60-65 percent were accounted for by German sellers, 20-25 percent by non-European sellers and 10-15 percent by sellers from other European countries, with less than 2 percent by sellers from Austria and much less by sellers from Luxembourg.

The market:

Companies can only be prosecuted for abusive conduct if they hold a dominant market position or have a relatively high market power pursuant to German antitrust legislation. Amazon declared its willingness to cooperate with the Bundeskartellamt at an early stage. For this reason the authority did not carry out any in-depth investigations into the issues of market dominance and market power of Amazon's German marketplace and eventually left these questions open as it did not publish a final legal assessment.

The proceedings were initiated because Amazon itself (Retail) is the largest online seller in Germany and operates by far the largest online marketplace in Germany, amazon.de. When it comes to the product market definition, the Bundeskartellamt is inclined to assume a product market for online marketplace services. The services associated with online marketplaces constitute a two-sided market. Online markets serve both sellers (sellers/manufacturers) wishing to sell their goods and customers (end customers) looking for goods to purchase. Amazon's significance as a "gatekeeper" for customer access is high due to its large customer base, some of which use the Amazon marketplace either primarily or exclusively for their purchases. According to studies published in particular by industry associations a large part of German online sales of well over 40% is generated via the amazon.de marketplace.

Under German antitrust law, it is also relevant to look into the question of Amazon's relative market power and the question of sellers' dependence on the amazon.de marketplace, which could also be left open in this case. Amazon's significant role in terms of access to customers could support the assumption of the dependence of online sellers on Amazon. However, the fact that there are smaller sellers who only entered the online business because of Amazon's marketplace

offer in the first place, which comprises a large service portfolio for sellers, also has to be considered in the overall assessment of the situation.