



Case report

9 December 2013

Amazon removes price parity obligation for retailers on its Marketplace platform

Sector: Online platforms; online trade

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The Bundeskartellamt (Federal Cartel Office) took administrative proceedings against Amazon Services Europe S.à.r.l., Luxembourg (Amazon) on account of the design of Amazon's Marketplace platform, in particular, its price parity obligation for retailers. The proceedings were terminated after the price parity clause was definitively abandoned.

Amazon is a subsidiary of Amazon.com Inc., Seattle, USA. Amazon.com operates so-called B2C (business-to-consumer) e-commerce platforms world-wide (in Germany under www.amazon.de), whose clients are end consumers. An extensive range of goods is sold on the Amazon platform, both by Amazon itself (its own retail business) and by third-party sellers via its so-called Marketplace. Amazon presents the two segments as a single integrated platform that makes no distinction between Amazon's own retail business and the Marketplace business. Amazon.de had a share of approx. 30-40% of the total volume of the German online trade in goods in 2012 and is the largest e-commerce platform in Germany for non-auction sales.

In order to take part in the Marketplace, third party retailers have to conclude an agreement with Amazon, which includes various rules and terms and conditions for Marketplace trading. The Marketplace service offered by Amazon includes product presentation, use of user accounts, payment processing, a dispatch option and rescission. Third-party retailers post their products on the platform, which is presented to users together with Amazon's offers according to a certain algorithm that takes the form of a ranking list. Retailers can choose different fee models which take account of the intensity of their sales activity. What the fee models have in common is that a percentage of the sales price is paid as a sales fee for each transaction.

The conditions of participation in the Marketplace included the so-called price parity clause. This largely prevented sellers on Amazon's Marketplace platform from offering their goods elsewhere online at lower price. The prohibition related both to other e-commerce platforms and to retailers'

own online shops. Compliance with the price parity instructions was regularly monitored and enforced by Amazon from 2012 onwards. Amazon threatened the retailers concerned with measures culminating in the withdrawal of the right to sell on amazon.de.

The Bundeskartellamt initiated proceedings under Art. 101 (1) of the Treaty on the Functioning of the European Union (TFEU) and Section 1 of the German Act against Restraints of Competition (German Competition Act, GWB) on account of the rules within the Marketplace, particularly the price parity clause. It found that the Marketplace constitutes a horizontal trade cooperation between Amazon and third-party sellers that has as its object and effect various restrictions of competition. The price parity clause is a hardcore restriction which is not indispensable for Marketplace efficiencies and does not allow consumers a fair share of the resulting benefit (Art. 101 (3) TFEU, Section 2 GWB).

Access to the Marketplace is not based on purely vertical agreements, since Amazon and the third-party retailers are direct competitors in the trading markets concerned. The content of the agreement is precisely not the use by retailers of the platform service of a neutral online service provider in exchange for a fee. Rather, the aim of participating in the Marketplace is to make a joint integrated presentation of an entire product range, including the Amazon product range, with a single address and the resulting simplified navigation. It is therefore a horizontal trade cooperation, the purpose of which is similar to the operations of a joint online platform in the form of a marketplace or technical platform.

According to the practice of the Bundeskartellamt, purely technical platforms are generally assumed to be of no competition concern, because despite the fact that such platforms inevitably involve harmonising certain competitive e-commerce parameters, they are, as a rule, exempt under Art. 101 (3) TFEU and Section 2 GWB in view of the efficiencies of such a marketplace. This does not apply to restrictions of competition that go beyond these parameters, however, and which are not indispensable to the efficiencies of the marketplace or which involve disadvantages that are inappropriately disproportionate to the efficiencies. This is the case in particular when there is a price parity clause.

The price parity clause has an effect on both sides of the market of the platform's operations. The investigation assessed the markets concerned to be the different retail product markets for the goods traded on the platform. The Bundeskartellamt also defined a national market for B2C online platform services for the sale of a general product range which does not include auction platforms, price comparison engines or online advertising.

The agreement of a price parity clause constitutes horizontal price-fixing for which an understanding on the pricing of just one part of an agreement (here of the third-party retailer) is sufficient if that retailer is a direct competitor. A general competitive relationship exists between Amazon and the third-party sellers in the retail markets in all product categories. Thus, the price parity clause is a hardcore restriction in all product categories. According to a poll of 2,500 online retailers carried out by the Bundeskartellamt, it has also resulted in significant price increases in e-commerce.

Moreover, the price parity specification not only affects the pricing of online distribution via a seller's own webshop, but also has a direct effect on Internet marketplace operators. Price parity clauses thus act as barriers to market entry for new competitors and hinder the expansion of existing competitors in the market. This is because the major competitive parameter – the fees for platform services – is neutralised by the price parity clause, since more favourable fees cannot be translated into more favourable prices for final customers. This prevents competitors from establishing a greater reach.

The conditions of the Marketplace agreement were non-exemptible, at least with regard to the price parity clause, and were thus in violation of competition law. An assessment of the possibility of the cooperation being exempted under Art. 101 (3) TFEU and Section 2 GWB would have had to take into account that an online marketplace like Amazon.de clearly promotes the distribution of goods. In particular, it makes it much easier to find products that would otherwise be very difficult to find on account of the extreme fragmentation of online shops. Price parity, a hardcore restriction in that it limits price-setting behaviour, cannot be seen either as an indispensable restriction, or as an appropriate way of involving consumers with regard to its price-raising effect. Rather, it results in safeguarding Amazon's large own-account share of sales as a competitor and the extensive reach of amazon.de, which cannot be attacked by competing platforms.

In the course of proceedings, Amazon announced that it would abandon its price parity clause. The proceedings were closed upon the fulfilment of the Bundeskartellamt's requirements that Amazon would cease and not revert to its previous business practices.

In these proceedings, the Bundeskartellamt cooperated closely with the British competition authority, the Office of Fair Trading (OFT), within the scope of the European Competition Network (ECN). The OFT carried out similar proceedings against Amazon. As a result of the two proceedings, Amazon abandoned its price parity clauses on an EU-wide basis.