

Amazon slightly changes course

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Introduction

In 2017 and 2018 the Federal Competition Authority (FCA) started receiving individual complaints regarding business practices on the 'Amazon.de' marketplace. Further, in December 2018 the Austrian Trade Association, a voluntary interest group representing trading companies, filed a formal complaint against Amazon Services Europe Sàrl (Amazon) regarding business practices and behaviour towards Austrian traders offering their goods on the Amazon marketplace, in particular relating to Amazon Services Europe Business Solutions agreements (BSAs). Similar cases were investigated by the German Federal Cartel Office and the European Commission. The FCA has coordinated investigations with both authorities and, in particular, cooperated closely with the Federal Cartel Office.

Complaints

The complaints were based on numerous factual representations by marketplace traders submitted to the trade association. Subsequently, the FCA and the Trade Association received numerous further complaints regarding business practices on the 'Amazon.de' marketplace from traders concerning, among other things:

- unjustified blocking and closing of trader accounts and retaining credit blocked traders;
- insufficient means of communication for traders;
- Amazon's extensive rights to use traders' materials;
- far-reaching disclaimers and indemnification agreements;
- Amazon's arbitrary increases in delivery times;
- discrimination of traders that do not use the Amazon logistics service;
- disclosing traders' purchase prices to Amazon;
- restricting product distribution for marketplace distributors;
- reimbursements in connection with unjustified customer returns;
- lack of transparency in rankings of products and marketplace traders; and
- forced use of other Amazon services.

Market survey and investigations

The FCA conducted an extensive market survey in which approximately 400 of the top-selling Austrian marketplace traders on 'Amazon.de' were interviewed in writing and via telephone. More than 80% of the addressed dealers returned the required documents to the FCA. The survey results, which showed that Amazon had market power for a representative selection of larger Austrian marketplace traders, may be summarised as follows:

- Traders rarely considered a relevant alternative marketplace to reach their customers and would not leave or change their marketplace even if Amazon raised its fees significantly.
- Traders that use alternative marketplaces generated the largest part of their turnover via 'Amazon.de'; however, a significant proportion sold almost exclusively on Amazon.
- Independant online shops, stationary traders and other online trading platforms were rarely mentioned as relevant alternatives.

Amazon agrees to change its terms and conditions

During the procedure, Amazon offered to change its terms and conditions:

- Ordinary termination will be subject to 30 days' notice. Termination or suspension with

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immediate effect will be possible only for material breach of contract or deceptive, fraudulent or unlawful activities or harm inflicted on other vendors, customers or Amazon's legitimate interests.

- The scope of Amazon's licences will be limited to the operation of the programmes or other Amazon products or services. In terms of time, the right of use or licence is limited to the duration of the original and derived IP rights of the dealers.
- Amazon will delete traders' obligation to indemnify Amazon and its executives, board members, employees and representatives from third-party claims based on the alleged violation of the BSA or the assurances of the third-party traders.
- The disclaimer will be reworded, whereby both parties will be liable only for damages in the event of intent or gross negligence. Liability for simple negligence is provided for injuries to physical integrity and for foreseeable, typically occurring damages resulting from the breach of essential contractual obligations.
- Amazon may change the terms and conditions of the BSA at its own discretion only after notice and the new version of the provision stipulates that an announcement must be made at least 15 days before an amendment is made.
- Jurisdictions and venues other than Luxembourg City will be possible.
- The extensive exclusion of liability or exemption from liability regarding storage in the 'Shipping by Amazon' programme will be removed.
- Marketplace dealers' three-day objection period for refunds granted by Amazon under the so-called 'A-to-Z guarantee' will be extended to 30 days.

The FCA has reviewed the amendments to the terms and conditions submitted. In principle, the revised terms and conditions are suitable both for essentially eliminating the concerns expressed and for helping to eliminate the majority of the objected terms and conditions in future.

Amazon has confirmed that the contract amendments will come into force on 16 August 2019. The FCA will therefore not pursue the objections in question for the time being with the promised adjustments to the terms and conditions. However, individual aspects will continue to be monitored. This applies in particular to communications and logistics. Should qualified complaints show that individual measures or changes to the BSA cited in Amazon's submission are unsuccessful, the FCA reserves the right to investigate further.

Similarly, if new facts which have not yet been taken into account become known, a new procedure may be initiated and the results of the present investigation may also be used. The FCA expressly upholds the recommendation that Amazon names a contact person to whom dealers can turn directly and seems unlikely to file an application with the cartel court for establishment, cease and desist or fines.

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