

# Kluwer Competition Law Blog

## Bundeskartellamt ends abuse probe after Amazon agrees to changing business terms for dealers

Silke Heinz (Heinz & Zagrosek Partner mbB, Germany) · Tuesday, July 30th, 2019

On July 17, 2019, the German *Bundeskartellamt* (Federal Cartel Office, “FCO”) terminated its dominance probe into Amazon’s business terms towards sellers on its marketplace after Amazon agreed to various changes, see press release [here](#). Amazon will implement the changes within 30 days, not only in Germany, but for all of its marketplaces in Europe, North America and Asia.

The Austrian competition authority (Federal Competition Authority, “FCA”) closed parallel investigations on the same day, referring to close cooperation with the FCO (see press release [here](#)). Equally on the same day, following a preceding informal inquiry the European Commission has launched an official in-depth investigation with a mostly different focus, *i.e.*, into Amazon’s dual role as a platform provider and retailer (see [here](#)).

### 1. Background and subject of proceedings

In November 2018, the FCO opened a formal investigation into Amazon’s potential abuse of dominance through its general business terms and practices towards sellers, triggered by many complaints from sellers.

The relevant business terms covered a broad range of issues, including jurisdictional clause (Luxembourg), far-reaching liability for sellers, blockage and termination of seller accounts, returns and reimbursements, confidentiality obligations for sellers, Amazon’s rights to use product material and parity requirements, as well as rules on product reviews and sellers’ ratings.

Additionally, the FCO reviewed a possible lack of transparency of applicable rules and upcoming changes.

The FCO terminated proceedings without a formal commitment decision. As Amazon agreed to change its terms in practice, it largely eliminated the factual basis for the FCO’s concerns and proceedings. The FCO nevertheless published a case summary in order to provide information and some guidance, see [here](#). In addition, Amazon agreed to keep the FCO informed of any potential future modifications of its terms and conditions, enabling the FCO to monitor compliance with the promised concessions.

### 2. Relevant market

The FCO does not reach a conclusion on market definition, because due to Amazon’s cooperation, the FCO did not have to carry out an in-depth analysis. The FCO is “inclined to assume” a market

for the provision of online marketplace services, serving sellers (merchants/manufacturers) on one platform side and consumers on the other. It does not define the geographic dimension, but refers to dealers in Germany and the German marketplace throughout the summary.

In 2013, the FCO had pursued a narrower definition in the Amazon's price parity clauses case (see case summary [here](#)): a national market for B2C online platform services for the sale of a general product range, without auction platforms, price comparison sites or online advertising. The current case summary does not provide reasons for the different approach now.

The Austrian FCA considers the relevant product market to comprise online marketplaces, excluding online and brick-and-mortar shops, but ultimately left the market definition open. Its case summary (see, only in German, [here](#)), however, shows that less than 7% of the sellers questioned see eBay as a relevant alternative to Amazon.

### 3. Dominance/relative market power

The FCO does also not reach a conclusion on dominance, for which there is a presumption under German law if a company has a market share exceeding 40%. But Amazon is described as a gatekeeper, due to a high number of customers buying mainly or solely via Amazon's marketplace. The FCO also refers to studies that trade via Amazon accounts for more than 40% of all online sales in Germany.

Under German law, there is the concept of relative market power/dependency (Section 20(1) Act Against Restraints of Competition, "ARC"): rules applicable to a dominant company also apply to companies of which small and medium-sized companies are dependent as a customer or supplier.

The FCO only briefly mentions the topic here: while Amazon's gatekeeper role could speak in favor of sellers' dependency, the fact that some smaller online sellers only entered the business because of Amazon's platform in the first place would also need to be considered.

In contrast, based on its detailed market investigation the FCA explicitly concludes that Amazon holds a dominant position as an online intermediary for Austrian sellers. The FCA finds that most Austrian sellers do not have a viable alternative for the Amazon marketplace (and would not switch to another marketplace even if Amazon increased the retailer fee).

### 4. Theories of harm and agreed changes

Nevertheless, the FCO sets out its preliminary assessment and theories of harm in the case summary. It explains that it primarily relied on German abuse of dominance rules (Sections 19, 20 ARC), but also considered Art. 102 TFEU.

**Exploitative abuse.** The FCO reviews most of the relevant business terms under an exploitative abuse test (Section 19(1), (2) nos. 2 and 3 ARC), *i.e.*, that Amazon imposed unfair business terms on sellers. The FCO refers to the same test and precedents as in the Facebook case: imposing imbalanced terms can constitute exploitative abuse by a dominant company based on qualitative considerations. The test requires a balancing of interests of the parties concerned, as well as interests reflected by the ARC and by legal provisions from other areas than antitrust law.

Here the FCO took into account the law on general terms and conditions, which protects against eliminating the other parties' fundamental right to self-determination. The FCO notes that not every clause potentially disadvantageous for sellers is objectionable under antitrust law. However,

the FCO concluded that overall, the application of the relevant terms and conditions extremely restricted the sellers in their competitive activity on the marketplace or even made it impossible, particularly due to a lack of means to enforce Amazon's compliance with main contractual obligations.

**Changes.** In the future, Luxembourg will not be the exclusive litigation forum any longer, but sellers can bring legal action to domestic courts in certain cases (with Luxembourg law applicable). Amazon will give notice for ordinary termination and is obliged to state reasons for extraordinary termination of accounts. The liability rules will be amended to the benefit of sellers. Returns and reimbursement: between sellers and Amazon, sellers will now be informed of and may object to Amazon's unilateral decision to accept and refund unjustified product returns (while the return-friendly policy vis-à-vis consumers will not change). Amazon will allow sellers to make public statements about Amazon without its prior written consent and to contact public authorities without its knowledge. Finally, Amazon will make applicable terms more transparent, make access more user-friendly and will give prior notice to sellers on changes.

**Exclusionary abuse.** The FCO reviewed some clauses under an exclusionary abuse test (Section 19(2) no. 1 ARC), which is similar to exclusionary abuse under Art. 102 TFEU. In its preliminary assessment the FCO considered that some clauses served to favor Amazon's own retail activities to the detriment of sellers, or could foreclose competition to Amazon marketplace through other online channels. This concerned for example the rules on product reviews and on usage rights and parity requirements for product material:

The product reviews that sellers obtained from external providers, so-called review clubs, could not be posted any longer or were removed from the platform by Amazon. (The review clubs provide reviewers with the products free of charge, but with no further remuneration.) In contrast, reviews generated by Amazon via its own "Vine" review program continued to be published. As the Vine program was only available to so-called vendors, *i.e.*, suppliers of Amazon Retail, the FCO found this to disadvantage other sellers on the platform and to leverage sales towards Amazon Retail – particularly regarding new products, for which there were no other admissible customer reviews available yet. So the theory of harm here seems to be leveraging through self-preferencing.

Product materials parity requirement: sellers had to grant Amazon rights to use product material and provide the same high-quality material to Amazon as they used in other sales channels. The FCO compared this to best-price clauses it already assessed in other cases (notably Amazon's best-price clauses and in the hotel booking platform cases). It explained that this could hamper sellers in setting themselves apart from Amazon's marketplace with higher quality or more specific product information in other sales channels, including their own online shops. This could have foreclosed competition to Amazon's marketplace.

**Changes:** Amazon will open its Vine product review program to sellers and gradually increase the necessary capacities. The FCO currently refrains from further concessions here, as it recognizes Amazon's interest to act against false/manipulative use of customer reviews in order to protect the platform. The FCO will, however, await the effects of the changes and the results of its ongoing sector inquiry into "online user reviews".

The product material usage rights for Amazon will be reduced, and Amazon will eliminate the parity clause. However, Amazon may impose quality requirements for product material on its

marketplace.

## 5. Comments and outlook

The FCO concluded proceedings swiftly after seven months – addressing the often-expressed concern that antitrust enforcement can be too slow in fast-developing digital markets. Thus, to reach a practical solution for many sellers apparently (and understandably) outweighed the desire for providing more definite guidance in a formal decision. However, should Amazon fail to properly implement the changes, the FCO can investigate again.

Some of the changes on transparency would seem to be required in any event under the EU P2B regulation (adopted on June 20, 2019, see [here](#)), but overall the changes go far beyond that. The case touches upon very up-to-date questions in antitrust enforcement in the digital world, *i.e.*, self-preferencing, foreclosure and exploitative conditions. It is remarkable that the FCO could reach global concessions from Amazon even though it only has jurisdiction over the German territory.

The case illustrates the parallel enforcement competences in the EU: Prior to the FCO and FCA announcements, the Luxembourg authority had already rejected a request for interim measures in an abuse of dominance complaint on July 3, 2019 (see [here](#)). In addition to the Commission's proceedings, the Italian antitrust authority continues its probe regarding allegations that Amazon leverages its platform position into logistical services (see [here](#)). The timing and the different scopes of proceedings show that the authorities coordinated their approaches within the ECN, and it will be interesting to see how much they will align in substance on questions featuring across proceedings (market definition, dominance, self-preferencing, *etc.*).

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