

Brand Gating: German Competition Authority Once Again Launches An Investigation Into Amazon (and Apple)

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The German Federal Cartel Authority continues its campaign against tech-giants by once again launching a probe into Amazon. This time, Amazon is not the only company affected. The authority also takes a closer look at Apple. Amazon has contracts with Apple, according to which only Apple dealerships and Amazon can offer Apple products on the platform. The agreement bans third-party merchants from selling Apple brand products on Amazon's marketplace. Amazon heavily uses such so-called 'brand gating agreements' - an issue not much discussed in the competition literature so far. The investigation follows several prior ones of the German authority into Amazon and focuses on the compatibility of the brand gating agreements with (German) competition law. Amazon is the subject of a few ongoing investigations by other competition authorities and could become one of the targets of upcoming regulatory activities.

Amazon and the Federal Cartel Authority - a recurring battle

Already in 2013, the authority reached a deal with Amazon regarding the company's price parity or most favoured nation clauses. Amazon abolished the clauses that required suppliers not to offer lower prices or better terms elsewhere. Proceedings against other tech giants for price parity clauses, such as booking.com, followed.

In 2018 and 2019, the authority examined Amazon's terms of business and practices towards merchants on its German marketplace. The investigation focused on Amazon's double role as the largest online retailer and the largest online marketplace. Amazon works as a gatekeeper for customers. The tech company and the Federal Cartel Authority again reached a deal, which led Amazon to change its terms and conditions for merchants on its marketplace worldwide. In particular, Amazon altered the liability provisions, choice of law and jurisdiction clauses, rules on product reviews, termination clauses, clauses assigning rights to use the information material, and confidentiality clauses.

The German watchdog did not lose its interest in Amazon. In spring 2020, the beginning of the COVID-19 pandemic, the authority received several complaints by suppliers concerning supply bottlenecks and discriminatory behaviour. Amazon stocked its warehouses with high-demand everyday goods to the detriment of other suppliers. However, a different Amazon COVID-19-related policy led to another investigation in August 2020. The Bundeskartellamt is currently also looking into the question of whether and how Amazon influences merchants' price-setting on its marketplace. Amazon had taken action against merchants who demanded allegedly 'excessive' prices for everyday goods or facemasks. Third-party merchants are often reliant on Amazon's marketplace. According to Andreas Mundt, president of the German authority, price controls and deciding whether a price is excessive, do not fall in the competence of private entities and could lead to discrimination and exclusion.

Brand gating and competition law

Now, the German Federal Cartel Authority is looking into another sensitive competition issue: brand gating. This policy allows brands to set up a barrier around their products or an entire brand that prevents or restricts third-party sellers to sell the branded product, and thereby also their counterfeits. Amazon, also being a retailer, reserves itself the right to continue selling the branded goods. Amazon offers brand gating mainly to large, established brands. In principle, though, any brand could benefit from the program. Different variants of brand gating exist. In general, third-party sellers are strictly prohibited from selling branded products on Amazon, as it is the case for Apple products. Retaliation by Amazon is not unusual and includes, for example, exclusion from the online marketplace. Competition authorities may view this as problematic since many third-party merchants are dependent on having access to Amazon's marketplace. However, in some cases, so-called authorised third-party sellers also can sell branded items on Amazon. Becoming such an authorised seller requires a qualitative assessment by Amazon, and, naturally, a fee.

Practices around brands and private labels generally could give rise to competition concerns. Brand gating is one of them, but it has not yet gained full prominence in the competition literature. Amazon's policy could lead to a violation of both Article 101 and 102 TFEU (and their German equivalents). On the one hand, cooperation and license agreements that contain brand gating, like the ones with Apple, could entail anti-competitive coordination contrary to Article 101. On the other hand, Amazon gives many reasons for its brand gating strategy: brand gating prevents a negative pricing policy as well as counterfeit products and increases content quality. While this could be true, Andreas Mundt fears that Amazon's clauses could be disproportionate and lead to an elimination of competition and discriminatory behaviour.

Moreover, Article 102 violations are possible, with Germany being the second-largest market for Amazon and Amazon operating the market-leading merchant platform in Germany. In particular, brand gating could entail exclusionary and discriminatory conduct by foreclosing third-party merchants from selling branded products to the detriment of consumers. The exclusion of third party merchants lowers the variety of merchants available for consumers to choose. The exclusivity could ultimately lead to higher prices. Even in cases of authorised sellers, the qualitative assessment and fee could encompass an exclusionary strategy (depending on the actual arrangement). Amazon should make sure that the qualitative assessment criteria are transparent, and that the fee does not exceed the means of small third-party merchants. Brand gating, as practised by Amazon today, also constitutes a hint of self-preferencing, a practice where it is still much debated if and when it gives rise to competition law concerns. Amazon is vertically integrated, i.e. is selling goods as a retailer and hosting sales by others as a marketplace. Next to the brand manufacturer, Amazon makes sure that the platform itself, in the capacity of an online retailer, is allowed to sell the branded goods.

Next steps

Both Amazon and Apple want to cooperate with the German authority. In the past, Amazon was able to persuade the Bundeskartellamt into agreeing to a deal. This way, the company avoided heavy fines. However, past proceedings against Facebook, Google or booking.com, show that the authority does typically not shy away from investigating and fining big tech companies.

Germany is not the only authority that is looking into Amazon's brand gating and comparable conducts. Italy has launched a similar investigation into both Amazon and Apple as well, due to an allegedly restrictive agreement that prohibits the sale of Apple and Beats branded products by third-party resellers on Amazon's marketplace. The US House Antitrust Report on Big Tech also included a section on a version of brand gating, focused on self-preferencing of Amazon's private-label products. In 2019, the European Commission opened an investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules (discussed on KCL here).

From a regulatory point of view, the rules aimed at tech giants like Amazon will soon tighten. The Commission is revising the vertical rules with a specific focus on digital. Furthermore, the Digital Services Act and the New Competition Tool are on the way. Germany itself will amend its competition rules with regard to the digital economy in the near future. The amendment foresees, in particular, a new concept of abuse concerning big tech companies with paramount cross-market significance (in particular concerning self-preferencing). One thing becomes clear: it's not easy to be a tech giant today.