

Amazon - the Janus-Faced Company

Platform power, marketplace dynamics and competition law in the age of accelerating e-commerce.

Selected legal insight for the sporting goods and consumer goods sector.

DR. JOCHEN M. SCHAEFER · PLATFORMS / COMPETITION

“Amazon has contributed to increasing visibility for many smaller retailers - yet its marketplace power has another, darker side.”

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: The Janus-faced company By Dr. Jochen M. Schaefer 7 September 2020 The current Covid19 crisis has accelerated Amazon's consumer goods business exponentially. The Silicon Valley giant doubled its profits in the second quarter of this year and increased its turnover to nearly \$89 billion. The share value has also nearly doubled since the middle of March. On Sept. 1, Amazon announced a program to spend one hundred million dollars this year (which, for Amazon, is undoubtedly pocket money) to promote (U.S.-based) small businesses during their Prime Day event and through the American Holiday season. Extremely fast deliveries of certain consumer goods by drones have just started in certain American regions on a test basis. Undoubtedly, with its marketplace platform ("the Marketplace"), Amazon has contributed in the past to significantly increase the visibility and customers of many small to medium-sized retail businesses. This is the positive side of the Janus head of Amazon, which is very frequently labeled as being the most customer-oriented company in the world.

Yet, there is another, darker side, which includes among other things, allegedly poor working conditions at Amazon's warehouse and its logistics premises, and the continued presence of illegal offerings and fake products on Amazon's websites. Increasingly, there are severe complaints by marketplace participants, sellers at the B2B level that Amazon is misusing its dominant online marketing power. Competition authorities all over the world including the U.S., the EU Commission and – at the forefront – the German Cartel Office ("the Office") are taking a closer look into Amazon's business practices as the most recent developments in Germany (and at the U.S. government level) prove. The Office had received a number of complaints from retailers trading on the Marketplace, who accused the U.S. company of using the current Corona crisis as a pretext to block and ban the sale of certain products and to control and influence the pricing of B2B retail clients without providing any valid or legitimate reasons for doing this, and responding to queries in an unsatisfactory manner. Some readers of this article may be wondering why Amazon allegedly exercises any influence on the pricing of the Marketplace dealers while it is well known for its policy to strive for the "best" (i.e. the lowest) competitive prices for consumers. However, we are not talking in this context about too low prices, but about an alleged attempt to lower prices that are disadvantageous to Amazon's business strategy. The Office's president, Alexander Mundt, has now decided to examine such complaints in order to determine whether, and to what extent, Amazon is unduly influencing the pricing of the dealers on the company's marketplace platform. What is known so far is that Amazon is trying to defend itself by stating that any such measures are directed to fight profiteering and usurious practices, for example through the sale on its Marketplace of masks or disinfection liquids and sprays during the current pandemic. What is obviously most annoying for retailers submitting such complaints to the Office is the fact that Amazon's lack of responsiveness to their attempts to resolve these kinds of issues, e.g. when the sale of certain products or their accounts as a whole were blocked. Dealer clients complain that, when Amazon reacts at all or with substantial delays, the internet service provider is only using pre-fabricated standard answers, be it on the phone or in its email replies. The frustrated dealers assume that Amazon's interventions are triggered by automated algorithms that are extremely difficult to overcome and to reverse. In a recent article dated Aug. 31, 2020, the reputed German financial daily newspaper Handelsblatt quoted Mark Steiger (who has been for more than a decade active on diverse online marketplaces and ranked as eBay's biggest seller of automotive parts in 2010) as saying that, in his opinion, it is a severe problem that it takes weeks, if not months, until such

interventions and blockages may be lifted, if at all.

In Corona times, this could well mean the sudden death of some small and medium-sized businesses, in particular if such blockages relate to a dealer account. Various blogs and internet forums conducted by Amazon clients are substantially complaining about the attitude and practices of Amazon in this particular field, and this obviously has caught the attention of the German Cartel Office. The Office's

President, Alexander Mundt, pointed out that the Office is not satisfied with Amazon's defense argument that all these measures were only Corona-related. He stated that the Office wants to understand through its investigations whether a systematic price monitoring by Amazon is taking place and which kinds of interventions result from it. Based on studies by the University of St. Gallen in Switzerland published in 2019, Amazon generated a turnover of €15.6 billion in Germany, giving it a market share of 40 percent of the whole online trade in the country. And as I indicated initially, this market share must have risen exponentially since the middle of March of this year. It is quite obvious that retailers are becoming more and more dependent upon the Seattle giant, who is not at all shy to increase such dependency through various tools and instruments, such as Amazon's fulfillment program. For many years I have observed these developments, which have been playing and are still playing a significant role in my work as legal advisor to brands, for example on the roll-out of selective distribution schemes at the national or European level. One of the most vibrant legal topics in this field has been whether, and to which extent, it is legitimate to contractually ban or at least regulate the presence of retail clients under certain conditions on Amazon's marketplace and on other third-party platforms. The most recent developments clearly demonstrate that competition authorities in Europe also see and acknowledge now the Janus-headed nature of Amazon, led by the German Cartel Office, which has been very rigid previously in pursuing a fairly strict pro-platform stand. In earlier years, the widely used standard argument of competition authorities had been that such platforms are truly beneficial, in particular for smaller and medium-sized traders. This does not only relate to Amazon, but is true also for other Silicon Valley giants such as Google and Facebook. My own theory and opinion has been somewhat different. I have always assumed that Amazon – the same as many other platform and marketplace operators (so-called ISPs) – tend to use marketplaces only as a bridging, temporary business model to collect as much customer and product information as possible from the dealers present on such platforms, first as data feeders and subsequently to foster and promote their own business as direct contract partners with manufacturers and brands, without needing the "middlemen" anymore, i.e. the third-party retailers. Needless to say, with all the powers conferred upon competition authorities, it still looks like a David-versus-Goliath fight, and you may take an educated guess on who are the Davids and who is the Goliath... Nevertheless, concerted efforts by national and regional competition authorities are having some effect. They are more than just pinpricks that would not hurt Goliath. In 2013, for example, the Office interdicted the use by Amazon of a best-price clause that would prevent dealers from selling their goods anywhere cheaper than on the Marketplace, and in 2019 the German competition authorities caused Amazon to significantly change its general Marketplace terms at the global level. I am also aware that the double function of Amazon – acting at the same time as marketplace provider for dealers and selling the very same products directly online without entertaining any direct business relations with their suppliers – is viewed very

critically by the Office and might even serve as a justification for a brand to contractually ban the presence of its retail customers on the Marketplace. According to the previously mentioned Handelsblatt article – contrary to its always emphasized mantra to be the most customer-oriented company in the world – Amazon reacted quite vaguely when confronted with the numerous complaints by its sellers and just pointed out that its seller and vendor partners should turn to Amazon’s seller partner support service. And this seems to be the real problem: dealers complain that Amazon is very seldom definite in resolving such issues. Blockages of products receive a code, which is not correct, etc., etc. In quite a number of cases, the term “most customer-friendly” seems to apply to end consumers alone, and not at the B2B (retail) level. The fees which a B2B customer has to pay to Amazon for turnover generated on the Marketplace have sharply increased during the last six years, rising from 19 percent to 30 percent now according to a study released by the U.S. think tank Reliance. And in order to be part of Amazon’s “Buy Box” program, dealers must subscribe to its fulfillment program, which leads to ever greater dependency. It remains to be seen whether and to what extent lawmakers and competition authorities will be able to at least tame this giant lion to some degree within the next few years – hopefully before it will have eaten up the vast majority of the wholesalers’ and retailers’ community in Europe and elsewhere. Photo by Christian Wiedinger on Unsplash

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