



Trading Platforms and Competition

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Those who want to sell their products online often cannot avoid working with one or more platforms. The relationship between merchants and operators is often problematic due to the market power of some platforms. New developments in legislation and case law put merchants in a better position.

In 2020, a total revenue of EUR 83.3 billion was generated in Germany from the sale of goods online. This represents a growth of 14.6% compared to the previous year. Many retailers rely on the services of platforms to reach potential customers. Their own online stores, if available, do not have good visibility. Some of these platforms have large market shares in certain sectors or even across markets. For example, Zalando is the online market leader in fashion. According to a study by Handelsverband Deutschland e.V., Amazon achieved a total of 46% of German online retail market share in 2018 via Marketplace (25%) and direct sales (21%). With total German sales of approximately €17 billion, the company generates more than the other nine largest online retailers combined, including Otto and Zalando. By comparison, the eBay platform, which is classified as an online auction house, had global sales of around 10.75 billion.

The advantages for commercial users

The online presence on certain platforms and the sales generated there are existential for many retailers. A collaboration not only offers the opportunity to increase the visibility of one's own products at low cost, but also other important benefits. For example, with programs such as *Fulfillment by Amazon* or *Zalando Fulfillment Solutions*, retailers have the option of outsourcing merchandise logistics. This means they do not have to worry about the demanding task of meeting specified shipping times. With the *Vendor Central program*, selected merchants are offered the opportunity to sell larger inventories directly to Amazon. This regularly leads to a significant increase in sales because customers show greater trust in products that are not only shipped but also sold by Amazon.

Dependence and loss of control

Nevertheless, caution is advised. If the presence on a particular platform is a central point of the business model, one is tied to the operator. The degree of dependency increases with the proportion of sales volume handled on a platform. The greater the number of services used, the more control over one's own products is lost. If, for example, shipping and returns



are left to the platform, control over the packaging of one's own goods as well as customer contact is lost.

Any move that ties a business's success more closely to a particular platform needs to be carefully considered. Merchants invited into Amazon's *Vendor Central* or a similar program should not make the decision of a commitment lightly. The moment merchandise is sold to the platform operator, the operator has control over pricing, regardless of what the manufacturer or merchant thinks. On the one hand, specifications must be adhered to in order to remain in the program. These can be imposed by the strong contract partner even after the contract has been concluded. Voluntary exit from the program, on the other hand, is not readily permitted. In addition, anyone wishing to gain insight into the statistics of the goods sold to the operator must pay for this. The analysis tools included in the basic program are not provided here.

Merchants as customers and competitors of the platform

The situation for merchants is complicated by the fact that many platforms, including Amazon, eBay and Zalando, are vertically integrated, offering both their own goods and those of third-party merchants. This means that commercial users are both customers and potential competitors of the platform.

Based on the data collected, operators can closely monitor which products are particularly successful. Thus, they can decide to invite the retailer or manufacturer to a particular program and, if necessary, exert pressure to get them to accept the offer. However, there are also known cases in which successful retailers have been forced out of the market by price wars, with the platform operator selling identical products from the same source as its own offers.

The fear that the platform's algorithms will disadvantage the products of third-party retailers in favor of their own is therefore well-founded. Also justified is the fear of being excluded from a platform's marketplace or having one's business account blocked without good reason.

Positive developments for merchants

In recent years, this questionable market power attracted the attention of the German Federal Cartel Office, which, through its intervention, achieved, among other things, a change in Amazon's terms and conditions in favor of merchants.

A significant change in competition law has been brought about by the Tenth ARC Amendment (Amendment to the Act against Restraints of Competition), which came into force on 19.01.2021. The new Section 19a ARC introduces the criterion of a company's *paramount significance for competition across markets*. It thus covers spillover effects from one market into other markets, both horizontally and vertically.

The Federal Cartel Office can formally acknowledge the paramount significance for competition and prohibit the company from, among other things:

- favoring its own offers over the offers of its competitors when mediating access to supply and sales markets;
- providing other companies with insufficient information on the scope, quality or success of the service provided or commissioned or otherwise making it difficult for them to assess the value of this service;
- demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand. In particular, to demand the transfer of data or rights that are not reasonably required for this purpose;
- making the quality in which these offers are presented conditional on the transfer of data or rights which are disproportionate to the reason for the demand.

Section 19a of the ARC does not completely eliminate the problems associated with the vertical integration of platforms. This would require a prohibition on acting simultaneously as a platform and as a merchant in a market, as in the provisions currently discussed in



the USA. Nevertheless, it sets important limits for companies with cross-market significance that make it more difficult to exploit their position of power. At the present time, the Federal Cartel Office has started proceedings to investigate the cross-market significance of Facebook, Amazon, Google and Apple.

European and international level

Important measures against the platform’s abuse of power are also being introduced at the European level. The EU Commission is conducting proceedings against Amazon for violating European antitrust regulations, especially for the misuse of data. The company faces fines in the billions (up to 10% of the annual global turnover, over EUR 230 billion in 2019). In December, the EU Commission presented a legislative package for the regulation of digital services and digital markets. If this is passed, platforms would be forced to grant commercial users a fairer business environment under threat of heavy fines.

Positive signals are also coming from the USA: anti-trust proceedings for the misuse of third-party data have already been initiated, and five proposed bills addressing antitrust issues in the digital markets are currently in discussion.

These developments are welcome from the perspective of commercial platform users. However, while waiting for further action from the relevant authorities, merchants continue to face existential questions, especially if they are forced out of a market segment or the platform blocks their account.

Can platforms exclude products from certain merchants from the marketplace?

Every company is allowed to conduct its business activities in a way that it deems to be economically reasonable and correct. This means that basically, platform operators are also free to decide which merchant they want to have a business relationship with, and what types of goods can be offered on the platform.

However, this business’ freedom only exists within the limits of competition law. If the operator holds a dominant position in the relevant market, the exclusion of some merchants may constitute an unlawful restriction of competition.

For example, the German district Court of Frankfurt recognized an unfair hindrance of third-party sellers when Amazon became a direct seller of Apple products. As part of the agreement, Amazon deleted all product ads of the brand that did not originate from Apple-authorized resellers. As a result, only Amazon’s own listings and those of two other authorized resellers remained on the platform. The illegality of the exclusion is here independent from the admissibility of the agreement, which is being investigated by the Federal Cartel Office.

If a similar constellation exists, it may be worthwhile to seek injunctive relief. Compensation for lost profits may also be considered.

When can the operator block or terminate a business account?

If there is a concrete indication that the merchant, by using the platform, violates the rights of a third party, the operator has the obligation to prevent further violations. An immediate blocking is also permissible without a prior hearing of the user and without an examination of the alleged infringement. However, the user must be informed about the specific reasons for the blocking.

A blocking is also permissible if the commercial user violates his contractual obligations towards the operator.

The operator has a duty to inform and give reasons to the merchant. A general reference to a potential violation, such as the manipulation of a product rating, is not sufficient. Rather, a concrete explanation of the offending conduct is required. The merchant should not have to puzzle over what he might have done wrong.

Surprising and incomprehensible blockings or terminations, on the other hand, are questionable. As a result of the Federal Cartel Office’s investigations, Amazon



has changed its contract terms. The company is no longer allowed to block or terminate merchants with immediate effect and without justification. The permissibility of similar terms and conditions is also doubtful for other platforms and is to be reviewed in the event of a dispute.

What can be done against an unlawful blocking or termination?

If a blocking or termination occurs without a valid reason, the motivation is insufficient or the accused breach of contract does not exist, it is recommended to first contact the platform operator. The existence of an error or the truthfulness of the allegations should be ruled out.

If the facts of the case cannot be clarified or the dragging out of the issue has negative consequences for the merchant, an interim injunction can be applied for. This can be used to obtain the removal of the blocking or termination and can be followed by a suit to seek damages for lost profits.

In January 2021, the German district court of Munich ruled for the first time in preliminary injunction proceedings that a blocking that is not sufficiently justified constitutes a restriction of competition. One of the interesting points for retailers here is that antitrust claims are to be qualified as tortious. This means that the court of the place in whose district the act was committed has jurisdiction under German law. If the German retail market is affected, the court in whose district the defendant has its general place of jurisdiction is competent. If this does not apply, any German court has local jurisdiction.

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