

# Dawn of Disgorgement

## Amazon ordered to end price caps

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Yesterday, the German Federal Cartel Office (*FCO*) ordered Amazon to end price caps on third-party sellers on its German marketplace and to surrender or “disgorge” the economic benefits it obtained from its anticompetitive conduct (“*Vorteilsabschöpfung*”). The FCO took issue with Amazon’s price controlling practice and found it to amount to an abuse of dominance. In a first tranche, Amazon was ordered to disgorge almost EUR 59 million. This is the first time the regulator has used its newly strengthened powers to seize benefits resulting from an alleged antitrust infringement. Amazon has already announced that it will appeal the decision.

### Amazon Unlawfully Imposed Price Controls on Sellers

Amazon was held to have used various price control mechanisms to review and influence the prices charged by independent third-party sellers on their products listed on Amazon’s e-commerce platform “marketplace”. Besides operating marketplace as a platform, Amazon (through “Amazon Retail”) is also active as a direct competitor to third-party sellers on marketplace. Whenever Amazon’s price control mechanism detects that a 3P-seller’s price is too high, the offer is either removed from marketplace entirely or, at least, it is no longer displayed in the “Buy Box”, which is essential for the offer’s visibility. Decreasing visibility or removing an offer entirely can lead to significant revenue losses potentially forcing a 3P-seller to leave marketplace for good. The FCO found the price control mechanisms to be opaque, and criticised that it was not made clear for sellers how price thresholds are determined. Amazon maintained that abandoning its practices would essentially lead to the promotion of uncompetitive or even abusive prices in the store, which would ultimately result in a poor shopping experience.

The FCO’s appetite to scrutinise pricing structures used by online marketplace platforms and inter-platform competition is underscored by the FCO’s newly opened investigation into Temu’s pricing practices for 3P-sellers on its e-commerce platform.

### German Answer to Big Tech

The FCO’s order against Amazon is based on Sec. 19a Act against Restraints of Competition (*ARC*). Introduced to tackle the dominance of “Big Tech”, this provision allows the FCO to intervene much earlier (i.e. before a company has achieved “dominance”) and more decisively against companies with “paramount significance for competition across markets”. Once a company is designated as such (as Amazon was in 2022), the authority

can prohibit specific practices, such as price controls, without having to prove a market abuse in the traditional sense in every single instance. This tool effectively complements the European Digital Market Act ([DMA](#)), allowing for flexible enforcement on national level alongside the broader EU regulatory framework.

## **Disgorgement of Benefits**

The decision marks the first time that the FCO relied on Sec. 34 ARC since its reform in 2023. This provision allows the FCO to disgorge economic benefits that were obtained as a result of an anticompetitive practice. Following the reform in 2023, the amount of the economic benefit obtained is now presumed to be at least 1 % of the undertaking's turnover generated in Germany with the products or services related to the infringement.

While a presumption rule aims to increase legal certainty, expedite proceedings and lower the evidentiary burden on the authority, its application in the Amazon case highlights significant ambiguities that remain:

- The FCO has not provided guidance on how it calculated the amount of EUR 59 million. It remains especially unclear which specific revenues are captured by the "affected turnover" for a multi-service giant like Amazon.
- Under the ARC, the FCO has discretion to decide whether to activate Sec. 34 at all. However, the authority has not provided any rationale for its decision.

Furthermore, a presumption rule is a relatively crude instrument as it could fail to capture the factual and economic nuances of each individual case. In that regard, critics consistently argue that it will be nearly impossible to rebut the presumption rule in practice.

## **A New Era of Disgorgement?**

The FCO has long taken an assertive stance toward enforcing competition rules against Amazon and other Big Tech companies. Yesterday it went a step further by not only requiring a change of conduct but also ordering the disgorgement of financial benefits. For companies, this shift raises the stakes as it signals that the FCO is willing to deploy the full breadth of its enforcement toolkit. Given that the presumption rule is still relatively new and, arguably, insufficiently nuanced, it remains to be seen how it will be applied in future.

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BLOMSTEIN will closely monitor further developments and keep you informed. If you have any questions on disgorgement of benefits, [Anna Hüttenlauch](#), [Max Klasse](#), [Elisa Hauch](#) and the entire team are ready to assist you.

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