Bundeskartellamt

Case Summary 25 January 2016

Unlawful restrictions of online sales of ASICS running shoes

Sector: Shoes

Ref.: B2-98/11

Date of decision:
26 August 2015

published:
13 January 2016

1. Decision

In its decision of 26 August 2015 pursuant to section 32 (3) of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB), the Bundeskartellamt made a retrospective declaration that the use of the "distribution system 1.0" by ASICS Deutschland GmbH (hereinafter referred to as "ASICS") vis-à-vis its authorised distributors based in Germany violated Art. 101 (1) of the Treaty on the Functioning of the European Union (TFEU)/section 1 GWB.[1]

By the end of 2012, ASICS had introduced a selective distribution system in Germany, which provided for restrictions (i) on the use of the ASICS brand name for online advertising, (ii) on cooperation with price search engines and (iii) on sales via online marketplaces ("distribution system 1.0"). On account of complaints by distributors, the Bundeskartellamt initiated administrative proceedings in September 2011 in order to examine the compatibility of the distribution system 1.0 with German and European competition law.

[1] The decision could only be announced on 13 January 2016 on account of a dispute about business secrets. Previously, on 9 January 2016, ASICS had withdrawn its application for a prohibitory injunction at the Higher Regional Court Düsseldorf against the publication planned by the Bundeskartellamt which foresaw an anonymisation of business secrets (but not to the extent desired by ASICS). In its decision of 11 January 2016 concerning the costs, the Higher Regional Court Düsseldorf imposed the costs on ASICS because "the application would have been unsuccessful".

In the course of the proceedings, ASICS gave up three of the provisions of the distribution system 1.0 to which the Bundeskartellamt had made a provisional objection and ceased to apply them as of late February 2015, or possibly earlier. The Bundeskartellamt therefore adopted a declaratory decision based on its assessment of the distribution system 1.0 under competition law. From the Bundeskartellamt's point of view, there was a justified interest in so doing, since declaring that an infringement existed facilitates the assertion of claims for damages by parties concerned. In addition, the decision may also have a signal effect for other manufacturers who use comparable clauses in their distribution systems.

In the view of the Bundeskartellamt, the ASICS distribution system 1.0, used vis-à-vis its authorised retailers, contained provisions that constituted restrictions of competition by object in violation of Art. 101 (1) of the TFEU/section 1 GWB:

- Prohibition on allowing a third party to use ASICS brand names in any form on the third party's website in order to guide customers to the website of the authorised ASICS retailer ("Prohibition on the use of brand names");

- Prohibition on the support of price comparison engines through setting up application-specific interfaces ("Prohibition on supporting price comparison engines").

These provisions did not qualify for exemption under Article 2 (1) of the Commission Regulation (EU) No 330/3020 of 20 April 2010 on the application of Article 101 (3) of the TFEU to categories of vertical agreements and concerted practices (Vertical Agreements Block Exemption Regulation, VBER), or under section 2 (2) GWB) in conjunction with Art. 2 (1) of the Block Exemption Regulation because in the view of the Bundeskartellamt they constitute hardcore restrictions within the meaning of Art. 4 (c) VBER. The fulfilment of the prerequisites for individual exemption under Art. 101 (3) of the TFEU/section 2 (1) GWB was neither demonstrated nor evident.

The distribution system 1.0 also contained a ban on the advertising or sale of ASICS products via third-party websites ("Prohibition on sales via online marketplaces"). According to the assessment of the Bundeskartellamt, this ban, too, could have been a restriction of competition by object that breached Article 101 (1) of the TFEU/section 1 GWB, and as a hardcore restriction on competition, one that is unexemptable under the VBER. Since each of the prohibitions referred to above was a hardcore restriction that led to the unlawfulness of the entire distribution system, it was possible for this question to remain open, however.

2. Economic background

The e-commerce sector brings considerable impetus for competition in its wake. In essence, it involves a reduction in transaction costs at all market levels, particularly of end customers' search costs, as well as the enlargement of distributors' (geographic) reach. End customers are enabled to compare offers with regard to quality and price in a way that is less time-consuming and costly than is possible in offline stores, and can also include a considerably larger number of offers in their comparison. In addition, the search is made easier for end customers through online-specific search opportunities such as search engines, price comparison pages or online marketplaces, which usually enable a direct comparison to be made between the offers of the distributors operating on their platform.

In addition, the Internet reduces information asymmetry with regard to the quality of the offer. Thus, end customers can obtain information not only on the manufacturers' or distributors' websites, but can also exchange evaluations and comments in Internet forums and online marketplaces. The Internet increases the retailers' reach, since they not only sell more products, but can also offer a wide range in a larger distribution area. Manufacturers can contact end customers directly via the Internet. They can provide information about their products on their website or in other Internet forums or sell directly to end customers from their own online shops.

Recently, offline and online distribution have also become more interconnected. More and more retailers are selling their goods through both offline and online stores. Many distributors who previously operated exclusively offline are additionally setting up an online store, and distributors who had previously only operated online are tending to open brick-and-mortar stores, at least in large conurbations. Also, new shopping concepts are being offered that link online and offline distribution. For example, in the case of many suppliers it is possible to select products on the Internet and to have them delivered to a particular store. Ever more frequently, manufacturers, too, are selling not only through their own brick-and-mortar stores, but also directly to end customers through their own online stores.

3. Market concerned and market shares

The Bundeskartellamt has defined a market for the manufacture and sale of running shoes. The investigation concluded that from the point of view of the opposite side of the market, running shoes are not interchangeable with sports shoes for other sports disciplines. The suppliers of

sports shoes for other sports disciplines are not sufficiently flexible to be able to switch from producing one product to another to be able to assume the existence of a larger relevant product market. The results of the investigations also found that it would not be appropriate to assume the existence of a separate market for running shoes in the high-performance sport sector. Any further subdivision of the running shoe market into separate running segments, such as trail running or natural running, was also ruled out.

In the view of the Decision Division, the geographic market for the manufacture and sale of running shoes is to be defined in national terms. In favour of this definition is in particular that on account of the nationally-based sales structures of the overwhelming majority of manufacturers, cross-border deliveries do not take place, or at least not to any major extent. Within the distribution systems of almost all running shoe manufacturers, distributors' orders are made with a national sales company or a distributor responsible for the respective country and transactions are processed through them. Another argument in favour of defining markets in national terms is that there continue to be different conditions of competition in the EU Member States. Correspondingly, according to the results of the investigations, no major cross-border deliveries of goods take place on the downstream end customer market either.

In the German market for the manufacture and sale of running shoes, ASICS had market shares of 25%-30% in the years 2011 and 2012. The other two large running shoe manufacturers are Adidas and Nike, which, together with ASICS, account for a market share of more than 75%.

4. Restrictions of competition within the meaning of Article 101 (1) of the TFEU

The prohibition on the use of brand names and the prohibition of supporting price comparison engines envisaged by the distribution system 1.0, both of which were designed as per se prohibitions, constitute restrictions of competition by object within the meaning of Article 101 (1) of the TFEU.

By means of the prohibitions referred to above, each of the distributors authorised by ASICS was prohibited from taking measures by means of which they would have been able to improve the searchability of their online stores for end customers. The per se prohibition of the use of brand names limited their possibilities to conduct online advertising with reference to the fact that they sell ASICS products. As a result, it is more difficult for customers who are looking for these products to find them. The per se prohibition of supporting online price comparison

engines hindered access to a sales channel that was of particular significance for end customers. Thus, the two prohibitions restricted the intensification of competition on price, which is possible in principle when using the Internet as a sales channel.

The clauses under discussion were also not exempted from the prohibition of Article 101 (1) of the TFEU on the grounds of the ECJ's so-called Metro case law. The ECJ recognised that there are legitimate needs justifying a limitation on the price-related competition associated with systems of selective distribution in favour of competition relating to factors other than price. Such distribution systems are compatible with Article 101 (1) of the TFEU.[2] The organisation of systems of selective distribution of this kind does not fall under the prohibition of Article 101 (1) of the TFEU, if (1.) the resellers are selected according to objective criteria of a qualitative nature which are (2.) defined uniformly for all potential resellers and applied in a non-discriminatory manner, (3.) the special nature of the product necessitates such a distribution network to preserve its quality and ensure its proper use and (4.) the criteria laid down do not go beyond what is necessary.

The distribution system 1.0 used by ASICS is not a purely qualitative distribution system, but a combination of a qualitative and quantitative selective distribution system. For this reason, an exemption in principle from the prohibition of Article 101 (1) of the TFEU was not possible. In addition, the prerequisite necessary for such an exemption, i.e. that the provisions were pursuing legitimate objectives in a proportionate way, was not fulfilled (see details below).

5. No exemption for the prohibition of the use of brand names

In the view of the Bundeskartellamt, the prohibition of the use of brand names was a restriction of competition by object that violated Article 101 of the TFEU/section 1 GWB and, as a hardcore restriction within the meaning of Art. 4 (c) of the VBER, was unexemptable.

The prohibition imposed by ASICS related to the use of brand names as a key word in paid search engine advertising, for the placement of advertisements on third-party websites and within the context ofof backlinks for search engine optimisation[3]. These measures would have enabled authorised ASICS retailers to improve considerably the searchability of their online offer of ASICS running shoes for end customers, enabling them to gain new customers via the

2 Cf. ECJ, judgment of 13 October 2011, Case C – 439/09, paragraph 40 – *Pierre Fabre Dermo-Cosmétique*; judgment of 25 October 1983, Case 107/82, ECR [1983], 3151, paragraph 33 – *AEG-Telefunken*; judgment of 25 October 1977, Case 26/76, ECR [1977], 1875, paragraph 21 – *Metro I*.

3 "Backlinks" refer to incoming links on a website leading from another website to this one.

Internet. By prohibiting these measures per se – i.e. regardless of whether they fulfilled specific demands concerning the form of advertising and of the third-party website – authorized ASICS retailers were restricted in their possibility of reaching customers outside their geographic area of operation via the Internet. Thus, the prohibition on the use of brand names constituted a major restriction in the possibility of authorised distributors to make online sales to end customers.

In a selective distribution system, however, a restriction of this kind may be a legitimate limitation of the sales possibilities of selective distributors (i) if its imposition on offline distributors in a comparable form were also to be permissible according to the so-called principle of equivalence; (ii) if, beyond such comparative considerations, it constitutes a legitimate quality requirement for the sales of ASICS products, or (iii) if it is justified from the point of view of trademark law considerations. The prohibition on the use of brand names did not fulfil any of these conditions, however.

A violation of the principle of equivalence as laid down in paragraph 56 of the European Commission's Guidelines on Vertical Restraints occurs if criteria are imposed for online sales which are "not overall equivalent to the criteria imposed for the sales from the brick and mortar shop". Different criteria must be justified by the different nature of these two modes of distribution. However, from the outset, it was impossible to carry out such an assessment of equivalence with regard to the prohibition of the use of brand names in the distribution system 1.0, since the use of brand names as keywords for paid search engine advertising, for placing advertisements on third-party websites and within the context of backlinks for search engine optimisation are Internet-specific forms of use for which there is no comparable offline equivalent. These Internet-specific search and sales functionalities specifically contribute to realising the efficiency of online sales – particularly the wider reach for distributors. Thus, considerations of equivalence could not justify the prohibition.

A legitimate quality requirement is deemed to exist when the requirement in question aims generally – i.e. in most or a large number of comparable cases – to ensure or improve distribution quality. In particular, it has to relate to aspects that influence distribution quality or efficiency, taking the needs of end customers into account. This includes, for example product presentation, customer services, the product range or the level of distribution. Thus, a "genuine" quality requirement is a specification which, on the basis of a generalized point of view, i.e. taking the needs of end customers into account, objectively serves or can serve to ensure or improve distribution quality. If the requirement is also generally proportionate, it may be

assumed that in spite of the substantial restriction of online sales, the overriding effects on competition are positive – i.e. they increase competition on quality – and the exemption criteria pursuant to Article 101 (3) of the TFEU are fulfilled. In the prohibition of the use of brand names provided for in the distribution system 1.0, this was not the case, however. It excluded per se all advertising featuring the ASICS brand without taking into account distributors' justified interests, for example in the online advertising commonly used in this line of business.

Finally, it was also not possible to justify the per se prohibition of the use of brand names with legal arguments relating to the use of trademarks. Concerning the question of whether a third party is entitled to use another company's brand as a key word in *Google Adwords*, it has already been decided that this does not necessarily constitute a trademark violation.[4] Rather, it depends on whether one of the brand's functions, particularly its indication-of-origin function (brand reference to the manufacturer and the product's (commercial) origin), the advertising function (advertising with the brand in the course of trade) or the investment function (use of the brand to acquire or maintain a good reputation that is suitable for attracting customers and building customer loyalty) are impaired by such use.[5] Accordingly, ASICS Deutschland would have had the possibility of laying down specific contractual requirements for the design of the advertisement that was to appear under "Advertisements" in the search results list, by means of which it would have been possible to exclude the possibility of any mistake on the part of consumers concerning the products' origin. For this reason, the per se prohibition of their use in the distribution system 1.0 was unnecessary and disproportionate.

The object of prohibiting the use of brand names on third-party websites was to restrict online sales by distributors to end customers. The principles applying to the question of whether a restriction pursuant to Article 4 of the Block Exemption Regulation is 'by object' are the same as those applying to the question of whether a restriction of competition 'by object' exists within the meaning of Article 101 (1) of the TFEU. Thus, the decisive factor is not the subjective views of the parties concerned, which are often difficult to assess, but rather the measure's objective purpose, i.e. its anticompetitive aim. A per se prohibition of the use of brand names is by its nature likely to limit distributors' online sales. Since all forms of online advertising using the manufacturer's brands were prohibited in the distribution system 1.0, distributors' online offers were considerably more difficult to find.

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4 Cf. ECJ, loc. cit., *Google France and Google*, paragraph 75 ff.

5 Cf. ECJ, loc. cit., *Google France and Google*, paragraph 79; decision of 22 September 2011, C - 323/09, *Interflora*, paragraph 42, 60 ff.

6. No exemption for the prohibition on distributors supporting price comparison engines

In the view of the Bundeskartellamt, the prohibition on distributors supporting price comparison engines was also a restriction of competition by object and thus constituted an infringement of Art. 101 TFEU/section 1 GWB; as a hardcore restriction within the meaning of Art. 4 (c) of the VBER, it was unexemptable.

The prohibition barred authorised distributors in the ASICS distribution system 1.0 from making active use of price comparison engines to promote sales[6]. They were not allowed to link their own website with the price comparison engine or to have it linked, with the result that the products and prices they offered did not appear when end customers made search requests. The prohibition existed independently of the design of the respective price comparison engine.

The prohibition on supporting price comparison engines in the distribution system 1.0 constituted a major restriction on online sales. With regard to the almost unlimited range of products available online and the many retailers operating via the Internet, it is necessary for end customers who particularly value certain criteria such as the price to make use of special search engines to help them "filter out" suitable offers. Price comparison engines are particularly significant in this respect. Even if they do not evaluate all the offers available online, but only those of the distributors connected to them, they enable end customers to survey the pricing of the distributors included with little effort, enabling them to call up offers they consider to be reasonably priced. Often, they are also used quite generally as a search engine for products and suppliers.

The prohibition on supporting price comparison engines in the distribution system 1.0 was not exempted from the prohibition of Article 101 (1) of the TFEU in accordance with the principle of equivalence. Also in relation to this clause, it was not possible to assess whether overall, equivalent criteria were provided both for sales in brick and mortar outlets and for online sales, since price comparison engines have no equivalent in offline sales.

There were no qualitative considerations that could justify the prohibition of support for price comparison engines. In particular, the per se prohibition was not justified as a measure to protect the brand image or to resolve a free-rider problem.

6 "Price comparison engines" are websites where consumers find a number of offers relating to a product they are looking for on one page, enabling them to compare prices.

A per se prohibition of price comparison engines is not a provision that generally serves to protect the manufacturer's brand image. The searchability of a branded product on a price comparison website cannot be regarded as damaging to the brand per se and thus, it cannot be prevented by reference to a need to protect a brand image. According to the ECJ's judgment in the *Pierre Fabre Dermo-Cosmétique* case, the mere "protection of the prestigious image of a brand" is not a legitimate need that can objectively justify an agreement that prohibits online sales per se in a selective distribution contract.[7] In the view of the Bundeskartellamt, the per se prohibition on cooperation with price comparison engines in the distribution system 1.0 had to be assessed accordingly.

A free-rider problem that needed to be resolved – where authorised distributors primarily selling online reap the benefits of investments in customer services mainly made by authorized distributors selling primarily offline – did not justify the per se prohibition of supporting price comparison engines in the distribution system 1.0. In view of the increasing interconnection between online and offline sales, it is already questionable whether there is a free-rider problem at all in connection with the products under discussion. Many end customers have started to use both online and offline distribution channels in parallel in a wide range of product areas. Ultimately, the question of whether an increased or specific need for advice exists that cannot (yet) be met by the possibilities available to online sales could be left open, because the possibility of free-riding is not a problem that results specifically from authorised distributors supporting price comparison engines. It exists independently and relates to online sales in general. To resolve any free-rider problem that may exist, measures other than a per se prohibition of price comparison engines would need to be adopted.

From the point of view of the Bundeskartellamt, the object of the prohibition of supporting price comparison engines was to restrict online sales by distributors to end customers. The prohibition limited price transparency on the Internet, not only in online but also in offline trading. The reduced price transparency led to a reduction in the competitive pressure on offline retailers for ASICS products. Also, higher prices for ASICS products led to a reduction in the competitive pressure on retailers who sell sports articles of other brand manufacturers in so-called inter-brand competition. These restraints on competition were exacerbated by the considerable concentration in the running-shoe market, in which the three leading manufacturers Nike,

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7 Cf. ECJ, judgment of 13 October 2011, Case C-439/09, paragraph 46 – *Pierre Fabre Dermo-Cosmétique*.

ASICS and Adidas, have a joint market share of more than 75%, and as a result of the fact that Nike and Adidas used to, or still, practice selective distribution systems similar to that of ASICS.

7. No exemption for the prohibition of the use of online marketplaces

In the view of the Bundeskartellamt, there were good reasons for assuming that the prohibition on the use of online marketplaces in the distribution system 1.0 was also a restriction of competition by object that violated Art. 101 of the TFEU/section 1 GWB and, as a hardcore restriction within the meaning of Article 4 (c) of the VBER, was unexemptable. In the specific case, however, this question was irrelevant for the declaration that the distribution system 1.0 breached competition law, as the other hardcore restrictions already ascertained – the prohibitions on the use of brand names and on supporting price comparison engines – sufficed.

In Germany, there is currently considerable legal insecurity with regard to the assessment of marketplace prohibitions under competition law. On the one hand there are higher regional court decisions according to which such prohibitions are permissible[8], while on the other hand there is also case law where they are categorised as a hardcore restriction under Article 4 (b) or (c) of the VBER[9].

From the Bundeskartellamt's point of view, it appears obvious that for many retailers, a per se prohibition of online marketplace in a selective distribution system leads to a major restriction on their possibility of making online sales to end customers. Online marketplaces such as Amazon or eBay are used by a very large number of customers and have a very wide reach. Thus, for small and medium-sized online shops in particular, presence in an online marketplace is decisive for customers being able to find them. In line with this, the Bundeskartellamt's investigations found that at least on the running shoe market, sales via online marketplaces are very significant for many distributors. Accordingly, it appeared natural to assess the per se prohibition of sales via online marketplaces in the distribution system 1.0 as placing a considerable restraint on sales to end customers within the meaning of Article 4 (c) of the VBER.

In the view of the Bundeskartellamt, equivalence considerations relating to offline sales are unlikely to have justified the prohibition on sale via online marketplaces. Specifically, there were

[8] Higher Regional Court Munich, judgment of 2 July 2009 (U (K) 4842/08), Higher Regional Court Karlsruhe, judgment of 25 November 2009 (6 U 47/08 Kart), Higher Regional Court Frankfurt, judgment of 22 December 2015 (11 U 84/14 (Kart)).
[9] Higher Regional Court Schleswig, judgment of 5 June 2014 (16 U Kart 154/13).

no evident standards of comparison with the offline trading sector. Online marketplaces with the possibility of making an individual product search, in which a results list is produced from which the end customer can see the price of the respective offer and, if applicable, the evaluation of the store concerned, exist only on the Internet. Shopping centres, which are often cited as a possible equivalent in brick-and-mortar trading, do not offer a comparable service.

Beyond equivalence considerations, the per se prohibition of sales via online marketplaces is unlikely to have constituted an otherwise permissible quality requirement, since the business model of the “online marketplace” as such does not harm the product presentation. The results list of a search on common online marketplaces usually shows not just the offers of one retailer, but of various other retailers for the product sought. Usually, the almost unlimited product range offered on the Internet forces end customers to limit their search as quickly as possible to particular products. If they searched for product groups or portfolios, they would receive too many offers. The possibility of searching for an individual product thus considerably simplifies the search and contributes substantially to (further) reducing search costs. In the view of the Bundeskartellamt, this coexistence of offers by different retailers also does not limit the quality of product presentation to an extent that would justify a per se prohibition on sales via online marketplaces. This is because the manufacturer can regulate the sale by authorised retailers via online marketplaces by less drastic measures than per se prohibition, for example by prescribing that a search via the online marketplace only for offers by authorised retailers is possible, following a respective choice by the user. In the same vein, the manufacturer can specify that the online store operated by an authorised distributor in an online marketplace has to fulfil the same requirements as a store operated on a website of the distributor himself.

It is also unlikely that the per se prohibition on sales via online marketplaces in the distribution system 1.0 was necessary in order to protect the manufacturer’s brand image. Manufacturers invest with regard to the differentiation function of the brand in creating and maintaining a brand image, in order to be able to achieve a higher price. Thus, the brand image may in principle represent a value for end customers for which they are willing to pay a premium. In the view of the Bundeskartellamt, however, the increased competition on price that results from online marketplaces does not necessarily damage brand reputation. It must also be taken into account that the per se prohibition provided for in the distribution system 1.0 solely covered authorised distributors who had already been selected by the manufacturer, and on whom requirements for product presentation and customer advisory service could be imposed. In such systems, the manufacturer can take action in an individual case on the basis of the imposed requirements against any violations that may be damaging to brand reputation. In this context, the per se

prohibition contained in the distribution system 1.0, covering all authorised distributors, appeared overall to be a measure that was not necessary to protect the brand image and that was thus disproportionate.

Finally, the resolution of any possible free-rider problem was unlikely to have justified the per se prohibition of sales via online marketplaces in the distribution system 1.0. While there may be a need for separate remuneration for special advisory services provided mainly by authorised offline distributors, the Bundeskartellamt considered that prohibiting sales via online marketplaces was not an appropriate means to achieve this as it is already unclear how such a prohibition would specifically contribute to remunerating special advisory services. At any rate, a supplier could respond to a problem arising with free-riding with a less severe measure, e.g. by requiring that distributors operating online also operate a physical retail outlet, or by giving financial support to distributors for special sales efforts.

8. Appeal proceedings

ASICS has lodged an appeal against the Bundeskartellamt's decision with the Higher Regional Court Düsseldorf.