

## Germany seeks solution with Asics in push for online sales competition

Jurisdiction : Europe / Germany

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### IN BRIEF

Japanese sporting-goods maker Asics remains under antitrust scrutiny in Germany for potentially restricting the sale of its shoes over the Internet. Following today's settlement today with Adidas in a similar probe, the Bundeskartellamt said it was still in talks with Asics, trying to balance the interests of manufacturers, sellers and consumers in the growing world of e-commerce. In an interview with MLex, the authority's president sets out why hampering online trade concerns him, and where the solutions may lie.

Antitrust law changes slowly, but markets don't. This is particularly true for products sold over the Internet.

In theory, platforms such as Amazon.com and eBay should be the world's shop window, but manufacturers of goods such as luxury handbags and branded clothes often seek to limit the sale of their goods online.

When it comes to brick-and-mortar shops, it's fairly easy for producers to protect their brands and keep a close eye on sales. For Internet commerce, they can set up selective distribution networks to limit sales to certain channels or authorized dealers. Their justification for this: Rogue sellers can damage their image and harm consumers purchasing their products, they say.

In 2010, the EU laid down guidelines on when such distribution networks are legal, but regulators rarely take on full-blooded investigations. Germany's cartel office is the exception. It has pursued probes into the sale of household appliances, garden equipment, cosmetics and hotel rooms in recent years.

Today, the Bundeskartellamt ended a probe into Adidas after the German sports-shoe maker agreed not to block sales on eBay and Amazon.de. In April, the regulator filed formal charges – a Statement of Objections – against Japanese sporting-goods maker Asics, also accusing it of limiting Internet sales.

In an interview with MLex, Bundeskartellamt President Andreas Mundt said the agency was engaged "in good talks" with Asics.

"We really hope to convey the message that we are open to solutions," he said. "But we have to take care to keep the online distribution open for all traders,

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and [to ensure] that not all the commerce is channeled to just a few online-shops of big traders and the producers themselves.”

The Bundeskartellamt suspects Asics may be breaking competition law by forbidding sales of its products over online marketplaces and keeping them off price-comparison websites. It has also taken issue with how Asics restricts the use of its trademarks on other websites, in particular as a keyword for search-engine marketing.

“If you take all that together, I would say that with regard to the ever-growing importance of marketplaces for the traders, particularly small and medium-sized ones, you almost get close, in the impact all this has, to a prohibition of online sales by Asics,” Mundt says. Consumers will struggle to find the best offers for shoes, and smaller traders may struggle to sell them, he explains.

“You have a case before your eyes where it’s justified to take some action so [that] the Internet distribution channel is still left open, on the one hand, and where the interests of the company promoting quality competition are safeguarded, on the other.”

“It’s really important that we shape what is possible and what is not possible in this area,” Mundt says. This is “something that was pretty clear in the brick-and-mortar world and isn’t so clear in the Internet world.”

– Restrictions –

Some manufacturers claim there are benefits to limiting distribution channels. It protects their brands and ensures that consumers get a level of service and quality that can’t be guaranteed over other platforms, they say.

Mundt says his office conducts a detailed assessment of such “efficiencies” arguments. But these must “weighed against the restrictions,” he says.

An EU court ruling from 2011\* stated that brand protection was “not a justification in itself,” he says. “Any exempted restraint should also increase the quality of distribution.”

Another justification for restricting distribution is that salespeople in brick-and-mortar shops provide necessary advice to consumers. This ensures that products are used correctly, manufacturers say.

Mundt questions this argument for running shoes, which can be bought online, tried on at home, and sent back, if desired. “Many consumers can ask themselves: How much advice do I really need in this respect?”

Manufacturers also argue that some retailers can become “free riders” on their

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investments in marketing and advertising.

“Of course, in individual cases there also exists a free-riding problem,” Mundt says. “But the question is: Does this justify the extensiveness of the restriction? Free-riding exists in any online distribution, no matter who sells online.”

“This is not only a problem if you sell via third-party platforms, but it is also a fact if Asics and Adidas plan to open their own online shops. How much do you weigh the efficiency argument of needing advice if the company itself might possibly free-ride on the services of its brick-and-mortar traders?”

Mundt stresses he doesn’t oppose “setting up a selective distribution system.” Companies have the chance to manage how their products are sold and how their brands are protected, he says.

“It’s not so much the question whether a company like Asics and Adidas may go for a qualitative selective distribution system. It’s more the question of how they do it, and to what extent they foreclose this distribution channel of the Internet,” he says.

Mundt says there are “several solutions” that aren’t as strict as an outright ban on selling over third-party platforms.

“The consumer knows he can find several offers of shoes when he searches on a platform. If the platform offers search criteria where he can choose whether he wants to see shoes only from authorized retailers, this could be a compromise where the manufacturer can set quality criteria.”

“EBay or Amazon can create search criteria and then give the customer the chance to get into a selective field. But a *per se* ban is way too restrictive. There are many, many other solutions that are efficient and less of a competition problem than the way Asics wants to solve the problem.”

– Europe –

“We are aware that we might come to a resolution that doesn’t only provide an impact for Germany, but also for other European countries,” he says.

“We are striving to fix problems in Germany and not anywhere else. If a company like Amazon drops a clause for all of Europe, that is still a decision left to the company. It’s not what we are striving for.”

\* C-439/09 - *Pierre Fabre Dermo-Cosmétique*

## Linked Case File(s)

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### Antitrust - Asics - Adidas

Subjects : Antitrust

Industries : Consumer Goods, Internet, Retail

Regulators / Courts : National Courts, Authorities

Jurisdiction : Germany, Europe

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