

Newsletter, 25 September 2014

Online restrictions under scrutiny in Germany

Bundeskartellamt closed its investigations against adidas after the company gave up market place bans and restrictions of search engine advertising

In 2012 the German Federal Cartel Office ("FCO") opened proceedings against ASICS Deutschland GmbH ("ASICS") and adidas AG ("adidas") to investigate alleged restrictions to sell products online. Both investigations focused in particular on the prohibition of online sales via third party platforms or online market places, as well as on limitations to use brand names for search engine advertising. The investigations raised international interest, since the FCO is one of the first major competition agencies to analyse the scope of online restrictions in selective distribution systems after the European Commission revised its Vertical Block Exemption Regulation No. 330/2010¹ ("VBER") as well as the corresponding guidelines² ("Vertical-Guidelines"). On June 27, 2014, the FCO closed its investigation against adidas after the company abandoned per-se market place bans and restrictions for search engine advertising. The ASICS investigation is still pending, with negotiations for amended online criteria ongoing, following a critical press release by the FCO in April 2014.³

Legal background

Selective distribution systems are legitimately operated by many brand owners to ensure that their products are only sold through authorised dealers, required to fulfill certain criteria. Selection criteria are typically designed to protect brand image as well as quality of sales and services.

Due to their pro-competitive effects on inter-brand competition, selective distribution systems based on purely qualitative selection criteria in line with the principles of the European Court,⁴ do not fall within the scope of the European cartel prohibition, Art. 101 (1) TFEU or its national equivalent.

Other selective criteria can benefit from an automatic exemption under the VBER, up to market share limits of 30%, provided that they do not constitute hardcore restraints. Beyond the "safe harbor" of the VBER, companies have to self-assess whether the selective criteria qualify for a general exemption pursuant to Art. 101(3) TFEU. For hardcore restraints an individual exemption is only available under limited circumstances.

Selection criteria that *de facto* prohibit online sales are hardcore restraints.⁵ Selection criteria that only govern the modalities of online sales are - subject to their overall equivalence with corresponding offline sales criteria - available for an exemption. In its Vertical Guidelines the Commission assesses restrictions to sell via third party online platforms in the second category.⁶ This balanced view is now challenged by the FCO.

Facts of the case

adidas, being one of the world's leading sports shoe and clothing manufacturers, operates a selective distribution system. In 2012, it

¹ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

² OJ 2010 C 130/1.

³ Press release of April 28, 2014, available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/28_04_2014_Asics.html?nn=3591568.

⁴ See ECJ, Judgment of 25 October 1977, case 26/76, Reports of cases 1977, 1875 - Metro I, according to which selective distribution criteria fall outside the scope of the cartel prohibition if (i) the nature of the goods necessitates selective distribution, (ii) the distributors are selected on the basis of non-discriminatory and qualitative criteria, (iii) the selection criteria do not go beyond what is necessary and (iv) are applied in a non-discriminatory manner.

⁵ ECL, Judgment of 13 October 2011, case C-439/09, Reports of cases 2011, I-9419, para. 54 - Pierre Fabre; European Commission, Vertical Guidelines, para. 56.

⁶ European Commission, Vertical Guidelines, para. 54.

amended the conditions for the online sale of its products. The new agreements involved a prohibition for authorised retailers to use online market places such as Amazon and eBay for the (re-)sale of adidas products. Still, authorised retailers were allowed to distribute adidas products via their own online shops as well as via "closed" third party shops such as otto.de or zalando.de. In addition, adidas allowed only one retailer to be active on each authorised platform. adidas furthermore restricted authorised dealers to use its brand name for search engine advertising.

After several complaints from retailers, the FCO initiated an administrative proceeding against adidas. As a result of extensive investigations at sporting goods manufacturers and German retailers, adidas was notified that its ban on sales via online market places and the restrictions imposed on authorised retailers with regard to search engine advertising gave cause for serious competition concerns. In response to the objections by the FCO, adidas submitted an amended version of its online sales conditions, in which it completely abandoned its ban on market places. It also clarified that all authorised retailers are free to use adidas brand related terms as search words for search engine advertising such as Google AdWords.

Reasoning of the FCO

Within the affected segment of sports shoes and clothing, the FCO defines separate relevant markets, inter alia for football clothing and football shoes, respectively. The FCO considers the market shares of adidas on at least two of those markets to exceed 30%.⁷ Therefore, the FCO mainly analyses an exemption for the restrictions in questions under Art. 101 (3) TFEU and Sec. 2 GWB, and not under the VBER.

The FCO concludes that the per se prohibition of online market places is not a purely qualitative selection criterion, but an appreciable restriction of competition.⁸ It further holds that a general exemption pursuant to Art. 101(3) TFEU/Sec. 2 GWB is unavailable, as the restrictions neither create efficiency gains, nor consumer benefits and are in any event not indispensable.⁹ In particular for small dealers market places are the only effective way for

selling online. A per se ban on online market places is not appropriate to address the problem of free-riding. Moreover, the legitimate purpose of a supplier to protect a certain brand image cannot serve as a blanket to justify a per se restriction of online market places, regardless of their respective sales surrounding.¹⁰ The requirement of certain sales services is likewise not accepted as a justification. According to the FCO there are more appropriate and less restrictive measures than a per se ban of market places to address quality concerns. This applies in particular to criteria governing the modalities of the distribution via online market places.¹¹

The FCO, eventually, adds some remarks regarding the assessment on markets where adidas' shares are below the 30% limit and that could hence benefit from the VBER.¹² The FCO claims good reasons to assess a per se prohibition of market places within the VBER "similarly". The FCO explains that it will generally distinguish between permissible quality requirements for modalities of online distribution and hardcore restrictions of competition directed against online distribution as such.¹³ The FCO's preliminary view is that online distribution criteria like the one in question are likely to fall within the second category as they de facto exclude internet sales.

Comment

The case summary provides information for assessing and drafting selective internet criteria outside the scope of the Vertical BER. The case summary, however, fails to give guidance on how to structure platform bans so that they would be accepted by the FCO as not going beyond what is necessary to protect legitimate supplier interests.

It is unfortunate that the FCO once more suggests that price competition is the only relevant parameter to consider in assessing the competitive effects of selection criteria, ignoring that for many products quality of sales and service as well as a certain brand image is of equally high importance. It is also unfortunate that the FCO at least for certain consumer goods seems to boil down the relevance of third party platforms to the simple equation: no access to online platforms, no access to inter-

⁷ FCO, Case report of 27 June 20014, B 3 - 137/12, p. 2 et seq.

⁸ FCO, Case report of 27 June 20014, B 3 - 137/12, p. 3 et seq.

⁹ FCO, Case report of 27 June 20014, B 3 - 137/12, p. 5 et seq.

¹⁰ FCO, Case report of 27 June 20014, B 3 - 137/12, p. 6 et seq.

¹¹ FCO, Case report of 27 June 20014, B 3 - 137/12, p. 8 et seq.

¹² See FCO, Case report of 27 June 20014, B 3 - 137/12, p. 9 et seq.

¹³ See FCO, Case report of 27 June 20014, B 3 - 137/12, p. 9 et seq.

net distribution. This view is difficult to accept, not only for being at odds with the Commission view as expressed in its Vertical Guidelines, but also for not being in line with more nuanced German court decisions, in an, admittedly, very controversial judicial landscape.¹⁴

This publication is intended to highlight issues. It is not intended to be comprehensive nor to provide legal advice. Any liability which might arise from the reliance on the information is excluded.

Brand owners selling products in Germany should carefully watch the outcome of the ASICS investigation. It is to be hoped that in closing this investigation the FCO will provide more clarity on its approach towards online criteria within the VBER. Brand owners should, however, manage their expectations: the reasoning of the FCO made clear that per se platform bans will be subject to challenges in Germany, in particular when applied in distribution setups with low standards for offline criteria (or even in non-selective distribution systems). Exemptions are likely to remain available when such provisions are tailored to the requirements of the products in question, are in line with the offline sales criteria and specifically take account of the sales surrounding offered by the respective online platforms.

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¹⁴ Prohibition of online sales via third party platforms permissible: KG Berlin, Judgment of 19 September 2013 - 2 U 8/09 Kart (provided that a supplier does not make an exemption for the offline sale of its products in discounters); OLG Karlsruhe, Judgment of 25 November 2009 - 6 U 47/08 Kart; OLG München, Judgment of 2 July 2009 - U (K) 4842/08. Prohibition of online sales via third party platforms void: LG Frankfurt, Judgment of 18 June 2014 - 2-03 O 158/13; OLG Schleswig, Judgment of 5 June 2014 - 16 U Kart 154/13.