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# The Düsseldorf Court of Appeals confirms a decision of the Bundeskartellamt against all prohibitions or restrictions imposed in relation to online sales made by traditional distributors *(ASICS)*

**ANTICOMPETITIVE PRACTICES, GERMANY, DISTRIBUTION/RETAIL, AGREEMENT, DISTRIBUTION AGREEMENT, ANTICOMPETITIVE OBJECT / EFFECT**

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This article considers how much the **Coty** Ruling has shed light on the extent to which a manufacturer can restrict the sales of its products over online platforms, especially in the wake of the recent German Case involving **ASICS** and basic principles developed at EU level to assess obligations imposed on distributors in an SDS context.

In May 2017, the Commission published its much anticipated Final Report on its E-Commerce Sector Inquiry, [***1***] launched as the competition law limb of its Digital Market Strategy. The Commission analysed e-commerce practices across the EU in relation to: (i) consumer goods; and (ii) digital content. In doing so, the Commission assessed prevailing market practices and potential competition barriers that might impede competition by restricting the growth of e-commerce.

## Online Distribution of Consumer Goods – Main Findings

In its Final Report, the Commission concluded that, in response to more price competition for consumer goods sold online (especially clothing, shoes, sportswear and outdoor equipment), many manufacturers are increasingly seeking to achieve more control over their distribution channels in order to exert greater influence on pricing levels, quality controls and territorial availability. To this effect, manufacturers often implement SDS with their retailers. That, in turn, sometimes raises questions about the compatibility of those restrictions with competition rules.

### Treatment of SDS

In order for distributors to become members of an SDS, they will be required to satisfy certain criteria established by the supplier. These criteria can be both qualitative (*i.e.*, particular characteristics of distributors, facilitating more effective distribution) and quantitative (*i.e.*, limits on the number of authorized distributors) in nature. Generally, an SDS reduces the number of retailers capable of distributing a certain product. As such, it invariably limits the extent of intra-brand competition. By comparison, the selection process can help in reducing transaction and distribution costs, and in creating efficiencies along the value chain by overcoming coordination problems.

Against this background, in its 1977 **Metro I** Judgment, the ECJ held that an SDS does not infringe Article 101(1) TFEU if the following conditions (the so-called "*Metro* criteria") [*2*] are satisfied: (1) the nature of the product necessitates distribution through an SDS (qualitative element); (2) resellers must be chosen based on objective (*i.e.,* non-quantitative) criteria; and (3) the criteria must not go beyond what is necessary.

Yet, even if an SDS does not fulfil the above criteria (*e.g.*, because the nature of the product does not necessitate distribution through an SDS or the SDS contains a quantitative element), it can still benefit from an exemption to the Article 101(1) TFEU prohibition under the VBER, provided that both the supplier and the distributor have market shares not exceeding 30% (Article 3 of the VBER), and the agreement does not contain a so-called "hard-core" restriction of competition. [*3*]

Hard-core restrictions are defined in Article 4 of the VBER. Most importantly, such restrictions include: the buyer's ability to determine its minimum sales price constitutes a hard-core restriction; more specifically, in an SDS, the restriction of active or passive sales to end users by members of an SDS operating at the retail level of trade; or the restriction of cross-supplies between selected distributors, including supplies between distributors operating at different levels of trade.

If the VBER does not apply, there is still scope for an individual exemption of an SDS under Article 101(3) TFEU if the restraint brings about efficiency gains achieved by indispensable measures which outweigh the restrictive effects of the restraint, and which will be passed on to customers.

### The Treatment of Online Sales Restrictions

Some suppliers might be tempted to resort to classic Retail Price Maintenance obligations in an online context, couched in terms which prohibit distributors from reselling the goods below a certain price. However, as mentioned above, given that they are **"hard-core" restrictions**, such provisions are incompatible with the Article 101(1) TFEU prohibition – unless they can be exempted under Article 101(3) TFEU on efficiency grounds, which occurs rarely.

The Commission has also identified non-price restrictions in e-commerce as being problematic under EU competition rules. These restrictions concern particular classes of end user and include **"platform bans"**, which prohibit the distributor from reselling goods on third party online marketplaces such as Amazon and eBay. In this context, it is important to note that the Commission's Guidelines on Vertical Restraints ("Vertical Guidelines") explicitly stipulate that suppliers may require their distributors to use third party platforms only in accordance with conditions agreed on by both parties. [*4*] As an example, the Vertical Guidelines allow the supplier to require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.

The Vertical Guidelines also allow the supplier to require quality standards for the use of the Internet site to resell its goods, just as the supplier may require quality standards for a shop or for sales by catalogue, or indeed for advertising and promotion in general. The supplier may, for example, require that its distributors have one or more

"brick and mortar" stores or showrooms as a pre-condition to becoming a member of its distribution system.

Other non-price restrictions include the prohibition on distributors from engaging with price comparison websites or from using manufacturers' trademarks for advertising purposes.

Overall, the conclusions of the Sector Inquiry suggest that platform bans should not be considered to constitute hard-core restrictions, given that the most important means of online sales for retailers continues to be through their own respective Internet sites. [*5*]

In contrast to what the Sector Inquiry and the Vertical Guidelines suggest, both the German Bundeskartellamt ("BKartA") and German courts have concluded that third-party platform bans constitute hard-core restrictions of Art 101(1) TFEU by object. As a result, they cannot be block-exempted under the VBER. Before the Commission published its report on the Sector Inquiry in April 2017, the German Court of Appeals in Düsseldorf (Oberlandesgericht Düsseldorf) had confirmed the uncompromising stance of the BKartA against all prohibitions or restrictions imposed in relation to online sales made by traditional distributors. [*6*] It endorsed the BKartA assessment that running shoe manufacturer ASICS had included illegal provisions in its agreements with members of its SDS. [*7*] ASICS' subsequent appeal against its denial of leave to appeal was dismissed by the Bundesgerichtshof (Federal Court of Justice). [*8*] The rationale behind the BKartA's Decision and the Judgment of the Appeal Court are assessed below.

ASICS subjected the distributors falling within its SDS to three distinct obligations, namely, to not: (i) use the ASICS Trademark in online advertising; (ii) engage with price comparison websites; and (iii) sell ASICS shoes on third party online marketplaces. [*9*] Each of these obligations was challenged by the BKartA under German and EU competition rules (Section 1 of the *Act against Restraints of Competition* and Article 101 TFEU).

In its Decision, the BKartA noted that fast Internet connections and the steady growth of online sales were changing the existing dynamics for the sale of consumer goods. New online distribution channels extended the reach of merchants who sell online and allowed them to broaden their range of products. As the Internet also helped to increase transparency for consumers, this development was said to have strengthened competition. [*10*] Yet, in order to benefit from these advantages, merchants were becoming dependent on end users actually locating their offerings, which is why merchants engage in online advertising or work with price comparison websites. [*11*]

The BKartA held that restrictions (i) and (ii) listed above violated the prohibition in Article 101(1) TFEU by object. Despite the fact that ASICS and the retailers did not exceed the 30% market share threshold, these provisions could not benefit from the "safe harbour" provided under the VBER because they constituted hard-core restrictions, which cannot be block exempted. The BKartA also held that the conditions of the efficiency exemption of Article 101(3) TFEU had not been fulfilled.

As regards restriction (i) (*i.e.,* the prohibition on using the ASICS trademark), the BKartA noted that this restriction did not in any event apply to offline-only retailers, thereby undermining the business rationale that it was designed to protect against free riding at the expense of retailers that had invested in a proper sales network for its products. It went on to hold that the restriction also went beyond what even trademark owners might prohibit. [*12*] As regards restriction (ii) (*i.e.,* the prohibition on engaging with price comparison websites), the BKartA held that the ASICS brand did not convey the sort of signalling function necessary for customers to be able to appreciate the *intrinsic*

value of the product. Consumers could verify the level of quality of the product prior to its purchase, both through offline and online distribution channels, [*13*] and this was confirmed by the fact that ASICS itself operated an online store.

While the BKartA ultimately left open the question of whether restriction (iii) amounted to a hard-core restriction and, hence, could be capable of being exempted under the VBER, it was implicit from the Decision that this was indeed the view of the BKartA. The BKartA also expressed the view that the ban of third party online marketplaces would not fulfil the conditions of the efficiency exemption under Article 101(3) TFEU.

The BKartA concluded that it was hard to justify any of the restrictions in question, given that they were akin to *per se* prohibitions. In its view, by not being able to advertise their own online shop through the use of the ASICS trademark and by being denied the ability to engage with price comparison websites or by not being allowed to sell via third-party platforms, merchants were essentially barred from extending their customer base, which amounted to a restriction of competition. [*14*] The BKartA expressed the view that ASICS' products did not constitute "luxury products", nor did the ASICS brand have a signalling effect which could justify an individual exemption if one took into account the need to protect its brand image. Accordingly, the BKartA considered the restrictions to be neither necessary to uphold a system of specialized retailers nor to protect the ASICS brand image. [*15*]

The Oberlandesgericht Düsseldorf, while confirming the BKartA's assessment, only examined the prohibition on engagement with price comparison websites, [*16*] holding in effect that the provision reduced merchants' competitive scope for action and that this was indeed the object being pursued by ASICS. [*17*]

In doing so, the Court confirmed that the SDS operated by ASICS did not fulfil the criteria which would otherwise need to be satisfied in order for the SDS to escape scrutiny from competition rules, [*18*] noting that running shoes could neither be considered to be "high-value" nor "luxury" products. [*19*] The relevant obligation therefore did not constitute a restriction that was qualitative in nature in the eyes of the Court because it amounted to the exclusion of an entire distribution channel, thereby preventing retailers (who depend on receiving public exposure from participating successfully in online trading) [*20*] from access to that sales platform.

The restriction was therefore prohibited, largely because ASICS had not even attempted to establish qualitative standards to ensure that merchants would only use price portals that have no negative impact on the manufacturer's brand, [*21*] but also because it was not considered to be a proportionate measure in the circumstances. Comparison sites did not evoke the impression of a "flea market", as ASICS had contended in its defence; rather, a reasonable consumer would be aware that a price comparison website merely served the purpose of displaying price quotations from online merchants and was different from the merchants' own websites. [*22*]

The Court also rejected the relevance of the argument that price comparison websites prevented merchants from consulting with their customers in relation to their products, as this would be true for *all* Internet sales. [*23*] Even assuming that running shoes required a particular advertising environment, the Court took the view that it was unclear why ASICS had not at least stipulated qualitative requirements for comparison websites. [*24*] It also dismissed the argument outright that the use of these sites incurred considerable costs, holding that it was unacceptable to justify such restrictions with the alleged aim of "protecting merchants from themselves". [*25*] In addition, the restriction did not address meaningfully the so-called "free-rider" problem that supposedly occurs when consumers visit "bricks and mortar" stores for consultation purposes, only to then purchase online. In the view of the Court, the free-rider problem concerned *all* online sales, not merely sales made through price comparison websites. [*26*]

The obligation could also not benefit from the exemption available under the VBER. Citing the *Pierre Fabre* Judgment, in which the Court of Justice had held that provisions effectively prohibiting retailers from using the Internet as a distribution channel constituted a hard-core restriction, the Court noted that the ban on retailers engaging with price comparison websites was in fact no different in its effect because it aimed at limiting sales to end users. [*27*]

When ASICS appealed against the denial of leave to appeal, it was again rebuffed. According to the Bundesgerichtshof, there was no need to clarify the question whether the prohibition to use price comparison websites constituted a hard-core restriction because the answer was clear, as it did limit at the very least passive sales to consumers. [*28*] The problematic nature of such a measure was, according to the Court, generally undisputed. Contrary to ASICS' submission, the Bundesgerichtshof took the view that the Commission's Sector Inquiry had not come to a different conclusion. [*29*] As such, there was held to be no need to have the issue referred to the ECJ – which would otherwise have constituted a reason to grant leave.

The Court held that the case before it was different to *Pierre Fabre* because the restriction did not amount to a *de facto* prohibition of online sales, although it severely limited an online merchant's freedom to sell online. [*30*] The Federal Court concluded that ASICS could not appeal the Düsseldorf Court's Judgment.

[*1*] The Final Report of the E-Commerce Sector Inquiry can be found at: *http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf* ↗.

[*2*] ECJ in Case C-26/76 *Metro I* [1977] EU:C:1977:167, especially at para. 20.

[*3*] According to Article 2(4) of the VBER, the exemption will not apply to vertical agreements entered into between competing undertakings, unless it is a non-reciprocal vertical agreement and the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level, or where the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

[*4*] See Guidelines on Vertical Restraints, para. 54.

[*5*] Final Report on the E-Commerce Sector Inquiry at paras. 39-42. The Advocate General also cites these conclusions in his Opinion on the **Coty** Case at para. 111. His Opinion of July 26, 2017 is available at: *http://curia.europa.eu/juris/document/document.jsf?text=&docid=193231&pageIndex=0&doclang=EN&%20mode=lst&dir=&occ=first&part=1&cid=654963* ↗.

[*6*] Case VI-Kart 13/15 (V) of April 5, 2017. The reasons can be found in the German language text at: *https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2017/VI_Kart_13_15_V_Beschluss_20170405.html* ↗.

[*7*] Decision B2-98/11 *Bundeskartellamt v ASICS Deutschland GmbH, Neuss et al.* of August 26, 2015. An English summary can be found at: *http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2* ↗. The full Judgment can be found in the German language

at:
*http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B2-98-11.pdf?__blob=publicationFile&v=3* ↗.

[*8*] Case KVZ 41/17 of December 12, 2017. The reasons can be found in the German language text at: *http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=1&nr=80673&pos=30&anz=520* ↗.

[*9*] Decision B2-98/11 *Bundeskartellamt v ASICS Deutschland GmbH, Neuss et al.* at paras. 68-70.

[*10*] See also Final Report on the E-Commerce Sector Inquiry at para 15.

[*11*] Decision B2-98/11, *supra* at paras. 82-95.

[*12*] Decision B2-98/11, *supra* at paras. 368-370.

[*13*] Decision B2-98/11, *supra* at paras. 500-505.

[*14*] Decision B2-98/11, *supra* at paras. 254-255.

[*15*] Decision B2-98/11, *supra* at paras. 260-267.

[*16*] Case VI-Kart 13/15 (V) at para. 50.

[*17*] Case VI-Kart 13/15 (V), *supra* at paras. 53-54.

[*18*] As mentioned previously, these criteria are: (i) the selection of distributors is to be based on objective criteria of a qualitative nature, laid down uniformly for all potential distributors; (ii) the non-discriminatory application of the criteria; (iii) the criteria are necessary for establishing SDS in light of particular product features in order to preserve quality and ensure proper use; and (iv) the criteria are proportionate.

[*19*] Case VI-Kart 13/15 (V), *supra* at para. 63.

[*20*] Case VI-Kart 13/15 (V), *supra* at para. 71

[*21*] Case VI-Kart 13/15 (V), *supra* at para. 72.

[*22*] Case VI-Kart 13/15 (V), *supra* at para. 75.

[*23*] Case VI-Kart 13/15 (V), *supra* at para. 77.

[*24*] Case VI-Kart 13/15 (V), *supra* at para. 81.

[*25*] Case VI-Kart 13/15 (V), *supra* at para. 83.

[*26*] Case VI-Kart 13/15 (V), *supra* at para. 84.

[27] Case VI-Kart 13/15 (V), *supra* at paras. 101-102.

[28] *Supra* at paras. 14 and 23.

[29] *Supra* at para. 15.

[30] *Supra* at para. 25.