

Permitted restrictions on e-commerce: German case law

Given the focus in Europe on the Digital Single Market and in particular the challenges posed by restrictions to cross-border online trade, such as the use of geoblocking measures, Miranda Cole and Nicoleta Tuominen of Covington & Burling take a look at recent cases in Germany that involve alleged restrictions on e-commerce. Miranda and Nicoleta discuss the work of authorities including Germany's Competition Authority (the 'FCO') in exploring the scope of permitted restrictions on e-commerce.

On 6 May the European Commission launched its Digital Single Market ('DSM') Strategy. The DSM Strategy touches on restrictions on cross-border online trade, including price parity and most favoured nation clauses and geoblocking and other restrictions relating to the supply of digital content online. In parallel DG Competition has launched a sector enquiry into restrictions on e-commerce. As industry shifts to focus on these initiatives it bears recalling recent cases involving alleged restrictions on e-commerce.

On 28 April 2014, the German FCO issued a Statement of Objections against ASICS Germany's online distribution practices, taking the position that ASICS' selective distribution system contained extensive anti-competitive restrictions on online distribution, including prohibitions on:

- Selling on online marketplaces such as eBay and Amazon;
- Supporting price comparison engines; and
- Using the ASICS brand on

third party websites, not even to guide customers to the online shop of an authorised distributor.

The FCO took the view that these restrictions are hardcore, since they collectively amount to a *de facto* ban on internet distribution whose main purpose appeared to be to control competition (online and offline).

The FCO takes the view that ASICS' online sales restrictions have the effect of substantially reducing the ability of its distributors to compete against each other. In particular, as distributors are restricted in their ability to advertise prices to new customers, or even advertise that they are offering discounts on online marketplaces, it becomes very difficult for a distributor to attract new customers on the basis of lower prices. As has been noted by the EU Courts, 'advertising is an important element of the competitive situation on any given market, since it provides a better picture of the merits of each of the operators, the quality of their services and their fees.'¹

In addition to the restriction of online distribution, the FCO also expressed concerns regarding ASICS' detailed differentiation between the distributors within its distribution system (with over 20 categories, each allocated a prescribed (sometimes limited) product range) and prohibition on cross-supply between authorised ASICS distributors in different categories.

The FCO concluded that the restrictions limit both intra- and inter-brand competition because, in addition to restricting competition between ASICS distributors, ASICS' market position and the online sales restrictions imposed by other major running shoes manufacturers meant that competition in the supply of

running shoes more generally was restricted.

Settlement negotiations between ASICS and the FCO broke down in January this year, and the FCO is currently pursuing its investigation. ASICS' settlement offer would have allowed listing on price comparison sites, and 'extended options' for use of ASICS trademarks in online advertising and sales through third party platforms.

In similar proceedings against Adidas² and Sennheiser³, the FCO settled the matters. Both Adidas and Sennheiser removed their prohibitions on sales through online marketplaces, and Adidas removed a restriction on search advertising using its brands. Restrictions on sales through online marketplaces have also been litigated in Germany. In its judgment of 19 September 2013⁴ the Kammergericht (the highest court in Berlin) prohibited Sternjakob from banning retailers from selling their bags on online marketplaces.

In a similar vein, the Higher Regional Court of Schleswig⁵ found that electronics and digital camera manufacturer Casio Europe's ban on sales via third party platforms is a hardcore restriction of competition, as it limits consumers' choices and reduces price competition.

Brand holders can, however, take some comfort from the Kammergericht's conclusion that Sternjakob's resale restriction on eBay was justified in light of its high quality branded products 'Der echte Scout' and '4You the Original.' The court found that 'selling products on eBay affects the product image.'⁶

As these and a number of other cases suggest, the national competition authorities, particularly the FCO and the UK's authorities (previously the Office

of Fair Trading and now the Competition and Markets Authority) have played prominent roles in exploring the scope of permitted restrictions on e-commerce. With the Commission's upcoming initiatives this focus is extending to Brussels.

While the Vertical Block Exemption Regulation ('VBER') currently makes some provision for online vertical arrangements, e-commerce has evolved into a whole new world since the VBER was drafted. It may no longer be sufficient to require that 'passive' internet sales be permitted'. The Commission's Guidelines on Vertical Restraints⁸ currently identify the following as hardcore restrictions of passive online sales⁹:

- Requiring an exclusive distributor to prevent customers located in another exclusive territory from viewing its website or to put on its website automatic re-routing of customers to the manufacturer's or other exclusive distributors' websites;
- Requiring an exclusive distributor to terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's exclusive territory;
- Requiring the distributor to limit the proportion of overall sales made over the internet; and
- Requiring the distributor to pay a higher price for products intended to be resold online than for products intended to be resold offline.

While they currently provide guidance regarding certain restrictions of passive sales, reflecting the principle that every distributor must be allowed to use the internet to sell products and that having a website and accepting orders by a customer following a visit to the website is a form of passive selling, the Guidelines do not provide any guidance

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regarding key issues including provisions maintaining parity between different online sales channels, prohibitions on bidding on keywords in search engine marketing auctions, or the circumstances in which intellectual property rights can justify a refusal to supply cross-border.

Historically, the Commission and national competition authorities have taken a hardline against direct or indirect pricing restrictions, and have almost always rejected arguments that such restrictions create benefits outweighing the competitive harm. Nevertheless, in the Commission's Guidelines on Vertical Restraints, it softened its position somewhat. For example, in relation to resale price maintenance ('RPM'), having rehearsed the various ways in which RPM may restrict competition¹⁰, it goes on to provide that RPM may, in certain circumstances, lead to efficiencies that must be assessed under Article 101(3) Treaty on the Functioning of the European Union¹¹. The positive effects identified include:

- Where a new product is introduced, RPM may incentivise distributors to promote the product during the introductory period, and provide the distributors with the means to increase sales efforts, to the benefit of consumers.

● Fixed and maximum resale prices may be necessary within a franchise system or similar distribution system to manage a coordinated short-term low price campaign (up to six weeks), which will equally benefit consumers.

● In some situations, the extra margin provided by RPM may enable retailers to provide (additional) presales services, particularly for complex products, and also help to protect such high-services from free-riding.

In short, the contrast between

ASICS and the other German sports shoes cases reflects the industry uncertainty that has been illustrated in a number of cases in Member States as widely spread as the UK and Poland in the last few years. There is little to no binding guidance on key areas as diverse as restrictions on bidding on keywords in search advertising and optimisation for natural search results, identifying online marketplaces on which products cannot be sold to ensure the integrity of luxury brands, price parity between third party online platforms, geo-blocking in various forms, and territorial restrictions to ensure the timely delivery of perishable goods. In addition, the ongoing online hotels cases illustrate the apparently diverging approaches at Member State level.

In this context, Commissioner Vestager's decision to review many of these issues through an e-commerce sector inquiry intended to complete its review by the end of 2016 should provide more guidance and increase clarity, whether through revisions to the VBER and Guidelines or individual cases.

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1. Case T-144/99, IMA-OEB v. Commission, EU:T:2001:105.
2. BKartA, B3-137/12.
3. BKartA, B7-13-35.
4. KG Berlin, 2 U 8/09 Kart.
5. OLG Schleswig, 16 U 154/13 Kart.
6. KG Berlin, 2 U 8/09 Kart, page 15.
7. Articles 4(b) (i), 4(b)(iii) and 4(c) VBER.
8. Commission Notice, Guidelines on Vertical Restraints, C 130/1 of 19 May 2010.
9. Ibid, paragraph 52 of the Guidelines.
10. Ibid, paragraph 224 of the Guidelines.
11. Ibid, paragraph 225 of the Guidelines.