

On-line Practices and Competition Law & Bird & Bird

The German "adidas" and "Asics" cases

CLA Webinar, 23 May 2016

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Restrictions of online sales

- German Federal Cartel Office, decision of 27. June 2014, B3-137/12, "**adidas**"
 - Decision to close the proceedings after adidas had amended its framework
- German Federal Cartel Office, decision of 26 August 2015, B2-98/11, "**Asics**"
 - Retroactive declaratory decision after Asics had amended its framework

Relevant restrictions

- Online advertising, i.e. no use of the supplier's brand name
 - ... as search engine keyword (such as Google Adwords)
 - ... in advertisements on third-party websites
 - ... in the context of backlinks (search engine optimization)
- Price comparison engines
 - no support of price comparison engines through setting up application-specific interfaces
- Online marketplaces (obiter dictum!)
 - no sale via online marketplaces (such as Amazon or ebay)

The FCO's approach

- Art. 101 para. 1 TFEU is fulfilled
 - *Metro* case law is not applicable
 - according to CJEU *Pierre Fabre*, a negative impact on the brand image is not relevant (for para 1)
- No block exemption on basis of Vertical BER
 - Hard core restriction in the sense of Art. 4 lit. c Vertical-BER
 - not "equivalent" to offline restrictions
 - no (real) qualitative criteria

Art. 101 para 1 TFEU

- CJEU *Metro* case law on selective distribution systems
 - no restriction of competition in the sense of para 1 if qualitative selection and legitimate objectives
- CJEU *Pierre Fabre Dermo-Cosmétique* (C-439/09)
 - "The aim of maintaining a **prestigious image is not a legitimate aim** for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU."
 - "... a contractual clause ... resulting in a **ban on the use of the internet** ... amounts to a restriction by object..."

Art. 101 para 1 TFEU

- FCO: Restrictions on online advertising and price comparison engines are not following legitimate aims
 - Quality of distribution is not affected
 - For online advertising on third party websites, specific preconditions for the use of the Asics brand could be made
 - Free riding is not specifically linked to price comparison engines but rather concerns online distribution in general. Therefore, other measures were appropriate such as the requirement for all distributors to have an offline store
 - Potential negative impact on brand image is not relevant (here for Art. 101 para 1)

Restriction on Online Advertising hard core, Art. 4 lit. c V-BER

As to the content of the restriction:

- The brand in ad's on third-party websites
 - Important marketing instruments
 - New clients and/or more clicks
- The brand as search engine keyword
 - end consumer's search for brand may result in distributor's advertising displayed above or next to search results
 - important marketing instruments as new clients and/or more clicks can be generated

Restriction on Online Advertising is hard core, Art. 4 lit. c V-BER

... as to the content of the restriction:

- The brand in search engine optimization
 - "Backlinks" on third-party websites important to (directly) increase traffic to distributor's website
 - Also important indirectly on "linkbuilding" that influences website's ranking in search engine results
 - Restricting search engine optimization as well as organic linkbuilding

Restriction on Online Advertising is hard core, Art. 4 lit. c V-BER

- FCO:
- CJEU *Pierre Fabre* is not limited to a complete ban of online sales, Art. 4 lit. c comprises any "restriction" in (active or passive) online sales.
- However, restriction must be "significant". This is "generally" the case where
 - a significant
 - internet specific distribution or advertising format
 - is prohibited per se
 - and the distributor can not compensate this by objectively reasonable means.

Restriction on Online Advertising is not "equivalent"

- EU Commission, Vertical Guidelines, sec. 56:
 - "Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing **criteria for online sales which are not overall equivalent** to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction.
This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the **same objectives and achieve comparable results** and that the difference between the criteria must be justified by the different nature of these two distribution modes."

Restriction on Online Advertising is not "equivalent"

○ FCO

- More stringent restrictions imposed on online distributors without being justified by the differences in the distribution
- Online distributors may use the same advertising activities as offline distributors but this is not an effective tool for online distributors.
- Internet specific advantages must not be limited by applying formally "similar" rules in online and offline distribution.
- If online criteria refer to elements that have no corresponding offline parallel, the equivalent test fails.

Restriction on Online Advertising is not a true qualitative criterion

- EU Commission, Vertical Guidelines, sec. 54:
 - "However, under the Block Exemption the supplier may 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 selling by catalogue or for advertising and promotion in general. "

Restriction on Online Advertising not a true qualitative criterion

○ FCO

- At the "interface to a hard core restriction" it has to be a "true" qualitative criteria
- Resellers may generally use the supplier's brand for common and accepted advertising practices
- Use of supplier's brand does not necessarily constitute a trademark violation. It depends on whether one of the brand's functions is impaired by such use.
- This allows for requirements for the design of an advertisement but not for a per se prohibition.

Restriction re. price comparison engines is not a true qualitative criterion

○ FCO:

- The output of price comparison engines does not result in an inappropriate presentation of products but mainly in web links
- Also additionally presented elements are not problematic as price comparison engines are not part of the sales process, and endcustomers are aware of this
- No general negative impact on brand value as a result of reduced pricing. No "return of investment" in brand value by reducing price competition.

Prohibition of online market places - a true qualitative criterion?

- EU Commission, Vertical Guidelines, sec. 54:
 - "Similarly, a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet.

For instance, where the distributor's website is hosted by a third party platform, **the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.**"

Prohibition of online market places – a true qualitative criterion ?

- FCO: possibly not a true qualitative criterion, but left open
 - The FCO's assessment is to a large extent similar to its assessment re. price comparison engines. In addition:
 - Legitimate objective to exclude private sales or sales by non-members of selective distribution system; however, no per se prohibition.
 - Supplier may require that the distributor's shop on the platform fulfills the requirements for its independent shop
 - **Vertical Guidelines Sec. 54 ?**
 - enacted prior to CJEU *Pierre Fabre*
 - the perception of eBay and Amazon has improved strongly since 2010

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