

15th Annual ACE Conference 2017

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Asics: Restraints on Retailers' Internet Sales in a Selective Distribution System

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presenter and do not necessarily reflect
those of the Bundeskartellamt

Arno Rasek
Chief Economist
Bundeskartellamt

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1. Background
2. The Case
3. Efficiency Arguments

EU CL treats selective distribution systems more leniently than RPM and online-bans

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- Presumption of illegality
 - Resale price maintenance
 - Restriction of “passive” (online) sales
- Presumption of legality
 - Selective distribution systems if designed to ensure retail quality
 - VBER / vertical guidelines follow a form-based approach
- What about internet sales?
 - When are sales “passive” / “active” ?
 - Tension between recitals 51+52 and 53+54 of vertical guidelines
 - Language regarding online sales seems outdated – does not match (German) retail reality anymore

Internet has changed retail fundamentals

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- Manufacturers introduced direct internet sales channel (so did Asics) and internet advertising
- Stationary retailers branched out into online sales and vice-versa (so did sport shops)
- Consumers combine online and offline sales channels
- Significant efficiency potential for suppliers, retailers and consumers
- Internet sales may make it more difficult for manufacturers to enforce RPM

Retailers' and suppliers' reach,
price transparency



Transaction costs, search costs,
information asymmetry



Abundant high-quality marketplaces and price-comparison engines

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- Emergence of large (e.g. Amazon, eBay) and specialized (e.g. cars, shoes) marketplaces
- Emergence of price comparison engines
- Use of platforms fosters the reach of small retailers
- Approx. 50% of the online retail sales are generated through platforms



Source of map: BVOH; www.marketplaces.digital

Courts in search for an appropriate legal standard on online sales restrictions

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- Many manufacturers introduced selective distribution systems with various forms of online sales restrictions
- Several private litigation cases (retailer vs. manufacturer)
 - Scout, Deuter, Coty ...
- Several agency cases
 - Double pricing systems: BoschSiemens, Lego, Gardena, ...
 - Platform bans: Ford/Opel/PSA, Adidas/Asics/Nike, ...
- Key question: means to ensure quality of distribution or to reduce price competition ?
- Efficiency considerations may depend significantly on the product concerned as well as on the concrete restrictions

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All major running shoe manufacturers imposed online sales restrictions in Germany

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- Product market: Manufacture and sale of running shoes
- Geographical market: Germany
 - Nationally-based sales structures of most manufacturers and cross-border deliveries are very rare
- Market structure
 - Oligopoly, three big suppliers
 - Market share Asics: 25%-30%
 - Aggregated market share of Asics, Adidas, Nike: more than 70%
 - Adidas/Asics/Nike introduced similar online sales restrictions
 - Adidas removed restrictions after intervention of BKartA



The Asics logo, featuring the word "asics" in a blue, italicized font with a white stripe symbol to the left.

The Adidas logo, featuring the word "adidas" in a black, lowercase font with three black stripes above it.



Asics introduced a selective distribution system in Germany in 2011/2012

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Asics did not run a selective distribution system before Asics' „distribution system 1.0” :

- Combination of qualitative and quantitative selective distribution system
 - Retailers “handpicked” by Asics; quantitative limitations
- Retailers were still allowed to sell through their own website
- But not allowed to
 - promote their products/shops through price search engines
 - sell via online marketplaces
 - use Asics brand name for online advertising (any other websites, Google AdWords, linkbuilding, backlinks, linkbrokerage, ...)

BKartA decision was confirmed by Düsseldorf Higher Regional Court

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- Declaratory decision of BKartA in August 2015 without fines
 - Asics gave up the three relevant provisions in February 2015
 - Appraisal of prohibition on sales via online marketplaces ultimately left open after deliberations with DG Comp due to recital 54 of VG
- Düsseldorf Higher Regional Court decision in April 2017:
 - Sufficient to evaluate prohibition to use price search engines
 - E.CA Economics opinion on PSE submitted in March 2017
 - Restriction of both intra-brand and inter-brand competition
 - Restriction by object in the meaning of Article 101 (1) TFEU
 - Hardcore restriction in the meaning of Art. 4 lit. c VBER
 - No individual exemption according to Art. 101 (3) TFEU
 - No fundamental questions requiring clarification, thus no referral to ECJ, no admission for appeal to FCJ → non-admission complaint to FCJ

Theory of harm

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- Prohibition of using price search engines may lead to higher prices for Asics shoes because search engines:
 - increase price transparency for consumers / reduce searching costs
 - enable smaller retailers to generate more sales through price competition
 - thus promote competition among retailers
- Same applies for prohibition of using marketplaces - but in addition possible effect on competition among manufacturers, as marketplaces:
 - increase price and quality transparency between offered products
 - thus enhance competition among manufacturers

Theory of Harm (continued)

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- Same applies for online advertising restrictions
- Given Asics' quality requirements for websites / online sales by its dealers, unclear how restrictions raise retail quality
- Prohibitions particularly restrict online sales by small and medium-sized sellers, although dealers had been approved by Asics

Annual revenue with running shoes	Share of total online sales through:	
	Online-Shops	Online-Marketplaces
< 500.000 € (24 retailers)	31%	69%
500.000 € < X < 5.000.000 € (20 retailers)	58%	42%
> 5.000.000 € (9 retailers)	81%	19%
Weighted share	51%	49%

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Efficiency argument 1: Free-riding

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- Argument by Asics:
 - Customers receive advice/services by stationary sellers and then buy online - online-retailers profit from investments in offline stores
- Findings of the BKartA:
 - Argument lacked nexus to the three online restrictions – why should these internet activities lead to more or less free-riding if compared to all other internet sales, including Asics' own?
 - Customers often collect information online before they purchase offline (variety of “customer journeys”)
 - e.g. BEVH study: Approx. 40% of all offline-purchases are prepared online; some customers order online and collect product at the store; etc.
 - Asics previously did not have a selective distribution system

Efficiency argument 2 : Lack of “individual service“

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- Argument by Asics:
 - Online sales lack advice and other services which can only be given by brick-and-mortar sellers
- Findings of the BKartA:
 - Only relevant for very few products (customization, training)
 - Participants of distribution system are authorized retailers already selected by Asics which ensures service standard
 - Product information offered online is often better than offline
 - Detailed descriptions
 - Customer reviews/recommendations
 - Video presentations
 - Possibility to try shoes at home and to return unsatisfactory products for free

Efficiency argument 3 : Damage to the brand image

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- **Argument by Asics:**
 - internet advertising / price comparison engines / marketplace sales can hurt brand image (which is indicator for quality)
- **Findings of the BKartA:**
 - Again: Argument lacked nexus to the three restrictions
 - Unclear how internet advertising could harm Asics' brand image
 - Quality of product presentation can be ensured via qualitative criteria
 - Manufacturer free to set qualitative criteria also for sales through marketplaces (not only for retailers' own websites) as well as internet advertising / use of price comparison engines
 - Today's platforms are able to secure valuable product presentation
 - e.g. Amazon provides a dedicated Asics' brand webpage

Conclusion

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- Seems that main target of Asics' online sales restrictions was reduction of price competition
- Efficiency arguments were not convincing in light of the affected products, the specific restrictions at stake and today's services attached to internet sales
- Search for an appropriate legal standard on online sales restrictions will continue over the next years

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Further reading:

Bundeskartellamt decision :

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

Düsseldorf Higher Regional Court decision:

https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2017/VI_Kart_13_15_V_Beschluss_20170405.html



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