

Oxford Symposium on Trends in Retail Competition

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Online Sales Bans: After Coty and Asics

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Chair

2nd Decision Division

After Coty: What happened?

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- Parfümerie Akzente, the complainant in the civil case against Coty, is acquired by Douglas
 - Merger Douglas/Akzente will be notified to Bundeskartellamt
 - investigation of online-/offline perfume-markets in Germany
 - Douglas + Akzente important players in German perfume-market
- Coty, the defendant in the civil case, cooperates with Amazon in the UK since January 2018
 - Coty developed skill „Let`s get Ready“ for Amazon`s Alexa (recommending British customers suitable cosmetics for their colour- and skin-type)
 - products ordered by Alexa and delivered by Amazon directly

After Coty: What happened?

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- Civil Case Parfümerie Akzente against Coty referred back to Appeal Court in Frankfurt (OLG)
 - Oral hearing on 12 June 2018
 - Parfümerie Akzente continues to pursue the case
- Federal Supreme Court, Judgement 12 December 2017
 - on Asics Case of Bundeskartellamt
 - per se ban of pricing search engines violates competition law
- Appeal Court (OLG) Hamburg, Judgement 22 March 2018
 - Online Platform Bans in Selective Distribution Systems not only for luxury products but also for high-quality brand products justified
 - here: dietary supplements + cosmetics

ECJ Judgement Coty 2017

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Judgement ECJ of 6 December 2017

1. Is ECJs judgement limited to luxury products?

- Online-Marketplace-Bans for luxury goods in selective distribution systems are exempted from Art. 101 TFEU, if they fulfill the Metro-Criteria
- open for non-luxury-goods if they can be exempted for other reasons (e.g. special advice necessary)
- European Commission thinks that ECJs Coty Judgement should be extended to high-quality brand products

ECJ Judgement Coty 2017

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2. What is luxury?

Various definitions for luxury goods depending on the context:

- ❖ prestige effect for customers: the higher the price the more attractive it is (Veblen effect) → BKartA in Asics decision
- ❖ in economics a luxury good can be defined a good for which demand increases more than proportionally as income rises – superior good in contrast to a necessity good
- ❖ originates from Latin “Luxus,”: indulgence of senses, regardless of cost
- ❖ Individual concept of luxury very subjective - differs throughout countries/continents

 2 key elements for luxury brands: exclusivity + high price

ECJ Judgement Coty 2017

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3. Open Questions

- Can ECJs arguments be transferred to other brand products?
- Is the VBER-exemption possible if manufacturer uses marketplace directly himself (discrimination)?
- Is ECJs assessment still justified if marketplaces instead of own online-shops are most important distribution channels (gatekeeper)?
- When does a restriction of findability of the distributor's online offer due to a marketplace ban amount to restriction of passive sales (Art. 4 c) VBER)?
- Is a different assessment necessary if manufacturer obliges its retailers to accept further online sales bans (see BGH Asics Judgement)?

Asics Case: The Facts

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- Product market: Running shoes
 - Not interchangeable with sports shoes for other sports disciplines
- Geographical market: Germany
 - Nationally-based sales structures, cross-border deliveries rare
- Market structure
 - Oligopoly, three big suppliers
 - Market share Asics: 25%-30%
 - Aggregated market share of Asics, Adidas, Nike: more than 75%
 - Nike/Adidas have/had similar selective distribution systems
- Commitment BKartA./ Adidas 2014
 - Adidas gave up marketplace ban etc. and proceedings were closed



BKartA Decision Asics 2015

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- Decision Bundeskartellamt of 26 August 2015
 - retrospective declaratory decision
- Two prohibitions violate Art. 101 TFEU by object
 - Prohibition on allowing to use ASICS brand on third party's website;
 - Prohibition on support of price search engines
- Exemption
 - no VBER-exemption: hardcore restriction, Art. 4 lit. c VBER (essential restriction of findability of the distributor's online offer)
 - no substantial arguments/facts for exemption, Art. 101 (3) TFEU
- Per-se platform bans violate Art. 101 TFEU by object
 - obiter dictum in the BKartA's decision against Asics
 - statement of German government in Coty before ECJ

OLG Düsseldorf Judgement Asics 2017

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- Judgement of 5 April 2017 limited its assessment to the prohibition of cooperating with price comparison engines
- found restriction by object under Art. 101 (1) TFEU and hardcore restriction, Art 4(c) VBER
 - prohibition part of selective distribution system, lacks objective justification, aims to restrict price competition
 - did not establish objective criteria of qualitative nature (because all PCE were banned) and not necessary to maintain brand's quality and image (=> proportionality)
 - consumers differentiate between the brand's product and the PCE
 - not necessary to ensure personal individual advice
 - not adequate to resolve possible free-rider problem

BGH Judgement Asics 2017

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Judgement of 12 December 2017

- ASICS may not generally forbid its retailers from using price comparison engines
 - per se ban not tied to quality requirements; considering further online sales bans a restriction of findability constituting a restriction of passive sales.
- "hardcore restriction" of online sales under Art. 101 TFEU
- combination of online sales bans
 - also market place ban and ban on using the brand for Google Adwords
- BGH made reference to ECJs Coty and Pierre Fabre
 - in contrast to high-priced cosmetic goods (in the ECJ Coty case), sports and running shoes (in the ASICS case) are not luxury goods
 - infringement of competition law for BGH so obvious (acte clair) that case was not submitted to ECJ

BKartA on Online-Marketplace Bans

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- Position of Bundeskartellamt
 - laid down in Asics decision 2015 and Adidas case 2014
- Only per-se bans of online-marketplaces are forbidden
- But Manufacturers can prohibit their retailers use of marketplaces that do not fulfill objective criteria set out by the manufacturer (e.g. 'own retailer shop' or vice versa 'no sale via common product page')
- Thus, it is possible that manufacturers may prohibit their retailers the use of certain non-neutral-marketplaces (where company runs marketplace and acts as retailer for the same consumer goods, e.g. Amazon)

Outlook: Issues to look at

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- Discrimination
 - Manufacturer cooperates (often exclusively) with marketplaces or the retail branch of companies that run marketplaces but prohibits its authorized dealers to sell via those marketplaces
- Role and market power of Amazon
 - Amazon acts both as powerful marketplace and as retailer
 - hybrid function and market power leads to potential for abuse, especially in relation to marketplace sellers
 - in case of market place ban Amazon might profit: major manufacturers might authorize Amazon as retailer while at the same time imposing marketplace bans on other retailers