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Series of papers on "Competition and Consumer Protection in the Digital Economy"

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Competition restraints in online sales after Coty and Asics - what's next?

The digital transformation has dramatically changed the competitive situation in commerce. Online sales and an increasingly professional interplay between online and offline sales channels are gaining ground over the traditional brick-and-mortar business. Consumers benefit from this in many ways: They can buy an unlimited number of diverse products online anytime and wherever they are, even via their smartphones. Comparing the offers of different retailers, either for products of different manufacturers or for products by the same manufacturer, is easy. As a result, competition increases. This puts pressure on manufacturers and dealers alike.

Renaissance of RPM and alternative restraints in online sales

In recent years, manufacturers have often responded to this increased competitive pressure by using vertical price-fixing practices, which involved exploiting the increased transparency of online prices. In some cases, they used software tools to monitor their dealers' compliance with recommended prices. These restrictions of competition are boosted by the use of algorithms for automatic price adjustment. The Bundeskartellamt therefore welcomes the fact that the European Commission has taken up vertical price-fixing cases after a long time. In late July, it imposed fines of approx. 111 million euros for price-fixing practices on the electronics manufacturers Pioneer, Asus, Denon & Marantz and Philips. They had used software to monitor their retailers' online prices and, in an effort to stabilise the price level, urged them to comply with specifically defined minimum prices whenever the retailers undercut the recommended retail price.

Besides direct price control, manufacturers try to influence online sales by imposing various contractual restrictions, which can serve their legitimate interest to ensure high-quality distribution. However, those restrictions can also serve to protect their traditional sales areas and the general price level. (Third-party) sales platforms like Amazon and eBay, price comparison sites like idealo.de and opportunities for authorised retailers to advertise on Google and other search engines by using the manufacturer's brand name play a special role in this context.

The Coty and the ASICS judgment

In the widely discussed decisions in Coty (ECJ) and Asics (German Federal Court of Justice), the courts have already dealt with the opportunities and, in particular, the limits of the manufacturers' influence on their retailers' online activities.

In its decision in *Coty*, the ECJ made it clear that a selective distribution system for luxury goods primarily serving to maintain the goods' luxury image can be in compliance with Article 101 (1) TFEU, provided that the other requirements set forth to eliminate discrimination are met. The court also decided that manufacturers might prohibit the use of third-party platforms like Amazon in order to maintain the brand image when setting up such distribution systems. Such a prohibition of third-party platforms, according to the court, would not constitute a hardcore restriction within the meaning of Article 4(b) or (c) VBER either. The court held that unlike in the *Pierre Fabre* case, the clause in question did not generally prohibit using the internet as a sales channel. In addition, users of third-party platforms could not be differentiated from the customer group of online buyers in general. Hence, they did not constitute a separate customer group within the meaning of Article 4(b) VBER. As the relevant contract permitted the retailers to advertise on online platforms and by means of search engines, customers were able to find them.

The Federal Court of Justice's decision in the *Asics* case regarding the prohibition to support price comparison engines only seemingly contradicts the ECJ's statements. The court considered it to be clear that the Bundeskartellamt was right in its assessment that a per se prohibition to support price comparison engines constitutes a hardcore restriction within the meaning of Article 4(c) VBER. It held that an appeal on points of law did not have to be granted and that the case did not need to be referred to the ECJ. The Federal Court of Justice pointed out that the prohibition applies irrespective of the specific design of the price comparison engine and constitutes a considerable restriction of the retailer in the area of online sales. The court also noted that unlike in the *Coty* case, the goods affected (i.e. running shoes) were not luxury goods. Additionally, the retailers were not only prohibited from supporting price search engines, but also from using the Asics brand on third-party platforms and in (search engine) advertising. Unlike in the *Coty* case, customers did not have access to the authorised dealers' online offer to an extent relevant in practice in view of the combination of restraints.

Open questions after *Coty*

The Federal Court of Justice's differentiations make it clear that many issues remain unsolved, even after the *Coty* decision.

The first unsolved issue concerns the question of where the prohibition of the use of online marketplaces in selective distribution systems constitutes a restraint of competition according to Article 101 (1) TFEU. The ECJ's statements in this regard are limited to luxury goods. One cannot simply transfer them to other (high-quality) brand products. It has to be noted that the ECJ did not define luxury

products itself, as the products in question had already been classified as luxury goods by the referring court. Neither the type of product dealt with in the Coty and Pierre Fabre decisions nor the comments on the image of a luxury good allow conclusions on the decision's transferability to other branded products. The ECJ did not follow the view that luxury goods were equal to high-quality goods as stated by Advocate General Wahl in his opinion.

The Bundeskartellamt considers that manufacturers can sufficiently protect the brand image of (high-quality) brand products through specific quality requirements regarding marketplace distribution. For example, as dealers are required to have their own online shop on the marketplace rather than share a product page with other dealers for distribution purposes. For this reason, it is not necessary to generally prohibit the use of marketplaces. In addition, it could be necessary to also consider other aspects of quality assurance in distribution, e.g. the consultation needs related to the product. However, especially with regard to products marketed on a large scale, the Bundeskartellamt doubts whether restrictions on platforms and other internet distribution channels increase inter-brand competition to an extent that this outweighs the considerable restrictions of intra-brand competition by general prohibitions.

There is also the question which conclusions should be drawn from the Coty case regarding hardcore restrictions under Article 4 VBER in cases where online marketplaces, rather than proprietary web shops and general search engines like Google Natural search, are becoming or already are the dealers' primary distribution channel.

The actual market conditions and consumer preferences in each Member State determine the significance of the different sales channels. Hence, assessments may vary according to region. In its decision in the Coty case, the ECJ primarily based its assessment on the fact that proprietary online shops, on EU average, represent by far the most important online sales channel. However, this does not apply to the German market. Marketplaces and price comparison sites are clearly more significant in Germany than in other Member States. In this context, it remains unclear at which point general platform restrictions and other restrictions of online sales activities reduce a dealer's visibility to an extent that fulfils the criterion of the restriction of passive sales pursuant to Article 4(c) VBER. Furthermore, it remains unclear whether an overall assessment of different restrictions is required.

Outlook: A closer look at hybrid platforms

In future, however, the main problem is not only going to be manufacturers aiming to exclude online marketplaces and similar suppliers from their distribution system. The success and scope of these online intermediaries has rather made them more and more indispensable for manufacturers. This is why they are looking for opportunities to cooperate with them in one way or another. In this context,

the “dual role” of some platforms is relevant. Some platforms (especially Amazon) act as an intermediary for online dealers on the one hand and as an authorised dealer for the same products on the other hand (also referred to as “hybrid platforms”). Not only did this dual business model allow the platforms to develop a strong market position based on increased network effects resulting from the large variety they offer. For instance, they provide a rapidly available wide and deep range of products, which can result in dealers' businesses being dependent on the platforms. There is also the risk that, when cooperating with the manufacturers, independent dealers can be disadvantaged or even squeezed out of the market due to unfavourable conditions. As a competition authority, the Bundeskartellamt wants to keep markets open and prevent e-commerce from being concentrated in the hands of only a few players, i.e. the manufacturers themselves, some large dealers and even fewer leading platforms, which would dramatically reduce customers' choice options.