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Keep Them Running! ASICS Dealers in Germany May Continue Cooperating with Price Comparison Engines

Daniel von Brevern (McDermott Will & Emery) · Thursday, February 1st, 2018

The German Federal Cartel Office ('FCO') decided in 2015 that ASICS, the manufacturer of sports and running shoes, may not prevent its dealers from cooperating with price comparison engines. The German Federal Court of Justice ('BGH') has now, in a judgment published on [19 January 2018](#), confirmed the FCO's decision. The judgment comes only weeks after the European Court of Justice ('ECJ') held in its [Coty judgment](#) that certain restrictions of online sales may be permissible.

The Case

In 2012, ASICS introduced new rules for its dealers in Germany ('Distribution System 1.0'). ASICS operates a selective distribution system, i.e. its dealers must satisfy certain condition to be accepted as an ASICS dealer. The Distribution System 1.0 provided that ASICS dealers may not use the ASICS-trademark on websites operated by third parties ('Trademark Prohibition'), and may not cooperate with price comparison engines by providing them with interface information ('PCE Prohibition'). Following complaints by ASICS dealers, the FCO initiated an investigation. The FCO ultimately concluded that both the Trademark Prohibition and the PCE Prohibition restrict ASICS dealers from 'passive sales'. Under the European Union's '[Vertical Block Exemption Regulation](#)' ('VBER'), the restriction of passive sales is considered a 'hard core' restriction, i.e. a severe violation of antitrust law.

ASICS challenged the FCO's conclusions, but the BGH ultimately confirmed the FCO's decision. For procedural reasons, the BGH assessed in detail only whether the FCO was correct in considering the PCE Prohibition a hard core restriction. The BGH held that there is 'no doubt' that a general prohibition to make use of price comparison engines, such as the PCE Prohibition, restricts passive sales within the meaning of the VBER. The BGH indicates that the outcome may have been different if ASICS, instead of flatly prohibiting the use of price comparison engines, had requested that they must satisfy certain qualitative criteria. Finally, the BGH concluded that its findings were consistent with the ECJ's findings in the Coty judgment. The ECJ held that manufacturers of luxury goods may, under certain conditions, restrict the sale of these goods through third party platforms. According to the BGH, these findings did not apply to ASICS' Distribution System 1.0: First, the system involved sports and running shoes, and thus not luxury goods. Second, the system provided for sales restrictions

which went beyond the prohibition to use third party platforms.

Conclusions

For many years, the question whether and to what extent manufacturers can (partly) restrict online sales has been among the most controversial topics in European antitrust law. There had been considerable expectations that the ECJ would shed more light on the relevant issues with the Coty judgment. But the judgment, while providing some answers, certainly raised a number of other questions. And the BGH's now published ASICS judgment now certainly does not provide much more clarity - at best, it does not make things worse. In particular, the BGH's claim that its judgment is consistent with the ECJ's judgment can and will be challenged, and the BGH did not help things by spending only two short paragraphs on discussing the Coty judgment.

The conclusions which can be drawn from both judgments are therefore necessarily of a fairly general nature:

- It is possible to restrict online sales, but there are limits.
- Generally applicable, not-differentiating restrictions are much less likely to be accepted than product-specific and tailored restrictions.
- The more online sales restrictions prevent consumers from looking at products, comparing prices and ultimately making an 'informed decision', the less likely it is that it will be found to be in line with European antitrust law.

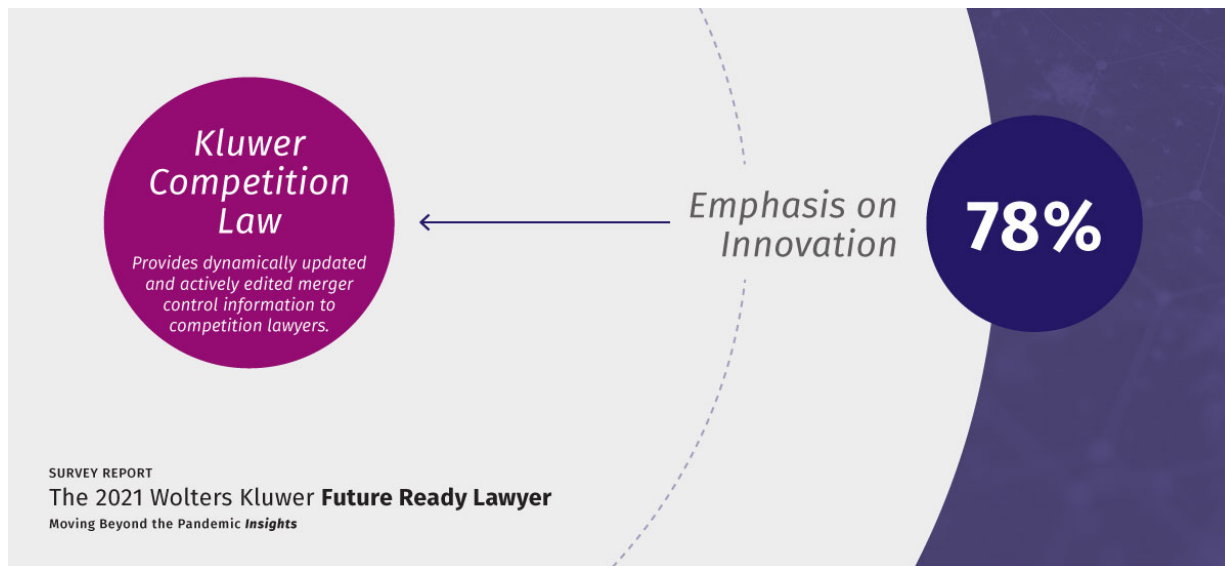
To gain further insight on what is possible, and what not, manufacturers and all other interested parties will have to wait for further - hopefully clear and consistent - decisions and judgments.

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