

# Kluwer Competition Law Blog

## Ban on sales via third-party internet platforms in Germany and Pierre Fabre – recent referral to the Court of Justice

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The question of how to treat bans on sales via third-party internet platforms in selective distribution systems and the impact of the Court of Justice's *Pierre Fabre* ruling (see judgment of October 13, 2011, case C-439/09) have been on the agenda in Germany for some time. Recently, the Frankfurt Court of Appeals has submitted a request for preliminary ruling to the Court of Justice (see decision of April 19, 2016, case 11 U 96/14 (Kart)).

### Ban on sales via third-party internet platforms

Such a ban typically occurs in a selective distribution system in a scenario in which the authorized dealers are subject to certain restrictions for online sales, for example to have a brick and mortar shop that needs to meet certain qualitative criteria, and to meet equivalent criteria on their own websites (in terms of product presentation, sales advice, after-sales services, *etc.*). The ban means that authorized dealers are not allowed to sell the products via third-party internet platforms, the most prominent examples of which include Amazon and eBay.

The European Commission Guidelines of Vertical Restraints ("Vertical Guidelines") generally allow a supplier operating a (qualitative) selective distribution system to impose such obligations on authorized dealers, if certain conditions are met. A ban on sales via third party internet platforms is covered in para. 54 of the Vertical Guidelines: "*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.*"

In Germany, however, some courts and the FCO took issue with a ban on sales via third-party internet platforms.

### The FCO's practice

In 2013, the FCO scrutinized Sennheiser's selective distribution system, because it included a ban on sales via third-party platforms, including Amazon, even though the latter was an authorized Sennheiser dealer itself. Sennheiser lifted the ban on sales via Amazon, and the FCO terminated proceedings (see FCO, case summary of October 24, 2013).

In *Adidas* and *Asics* in 2014 and 2015, respectively, the FCO found that general bans on sales via third-party internet platforms in selective distribution systems restrict intra-brand competition, and particularly hurt small and medium-sized dealers, because they primarily depend on third-party market places like Amazon and eBay in order to attract online customers. Adidas eliminated the disputed clauses and the FCO terminated proceedings (see case B3-137/12, case summary of

August 19, 2014), whereas the FCO issued a declaratory decision against Asics after it changed its distribution system (see decision of August 26, 2015, case B2 – 98/11).

Importantly, the FCO found that following the *Pierre Fabre* ruling, manufacturers can *per se* no longer rely on the aim to protecting their brand or a luxury image in order to justify a selective distribution system (and any related qualitative restrictions). The FCO referred to para. 46 of the judgment: “*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.*”

### **German court cases**

German courts have not followed a consistent line: In earlier cases, some higher regional courts accepted bans on sales via third-party platforms, for example in 2009 the Karlsruhe and Munich Court of Appeals (see decision of November 25, 2009, case 6 U 47/08 Kart, and decision of July 2, 2009, case U (K) 4842/08, respectively).

In contrast, in 2013 the Berlin Court of Appeals rejected a ban on sales via third-party-internet platforms (see decision of September 19, 2013, case 2 U 8/09 Kart), as did the Schleswig Court of Appeals in 2014 (see decision of June 5, 2014, Case 16 U 154/13). The courts in Munich and Schleswig *inter alia* differed on the question whether the ban constitutes a hardcore restriction pursuant to Article 4b of the European Commission’s Vertical Block Exemption Regulation (“VBER”) – customer groups. Some lower courts briefly referred to para. 54 of the Vertical Guidelines, but said it had become obsolete due to the *Pierre Fabre* ruling (see Frankfurt Regional Court, decision of June 18, 2014, case 203 O 158/13).

In December 2015, the Frankfurt Court of Appeal – the now referring court – decided that a ban on sales via Amazon in Germany imposed by a functional backpack manufacturer did not infringe competition law, but was justified by the qualitative selective distribution system in place (see decision of December 22, 2015, Case 11 U 84/14 (Kart)). The court accepted that sales via Amazon would not meet the manufacturer’s criterion of offering proper sales advice on the various products. The court disagreed with the FCO regarding the impact of *Pierre Fabre*: in its view the ruling was not aimed at abandoning the existing EU case law that the luxury image of a brand might justify imposing qualitative criteria in a selective distribution system – the ruling rather meant to clarify that an absolute ban on internet sales (as in *Pierre Fabre*) could not be justified by the aim to maintain a luxury brand image. Ultimately, however, the Frankfurt Court of Appeals only applied national competition law, which is presumably the reason why it did not refer the case to the Court of Justice at the time.

### **The referral case**

The referral case concerns the EU-wide selective distribution system of luxury cosmetics manufacturer Coty, including a ban on sales via third-party internet platforms. The primary reason for the qualitative criteria imposed is to maintain the luxury image of the brand. The Frankfurt Court of Appeals summarizes the various approaches in Germany in the referral request and asks the following questions:

1. Post-Pierre Fabre, can a qualitative selective distribution system in principle still be justified and compatible with Article 101(1) TFEU because of the aim to maintain a luxury brand image?
2. If yes, can it be compatible with Article 101(1) TFEU to impose on authorized (retail) dealers of

a selective distribution system a general ban to sell via third-party internet platforms, irrespective of whether the manufacturer's qualitative criteria are satisfied in the actual case?

3. Is Article 4(b) of the VBER to be interpreted that a ban on sales via third-party internet platforms imposed on authorized (retail) dealers of a selective distribution system qualifies as a hardcore restriction regarding customer groups?

4. Is Article 4 (c) of the VBER to be interpreted that a ban on sales via third-party internet platforms imposed on authorized (retail) dealers of a selective distribution system qualifies as a hardcore restriction regarding passive sales to consumers?

### Comments

The referral request has been overdue and will hopefully provide more clarity on the open issues. The FCO's practice deviates from the Vertical Guidelines in para. 54, and it is desirable to have a common approach on the application of EU competition law across the EU, in particular regarding the digital economy. It seems unlikely that the FCO would actively pursue other cases of bans on sales via third-party internet platforms while the referral is pending. Given the existing precedents, a swift response from the Court of Justice would be highly welcome.

The first referral question of course goes well beyond the original case (ban on sales via third-party internet platforms) and concerns the cornerstone of selective distribution systems and their justification for luxury goods in the EU. So it may have a much broader impact than the case suggests at first sight.

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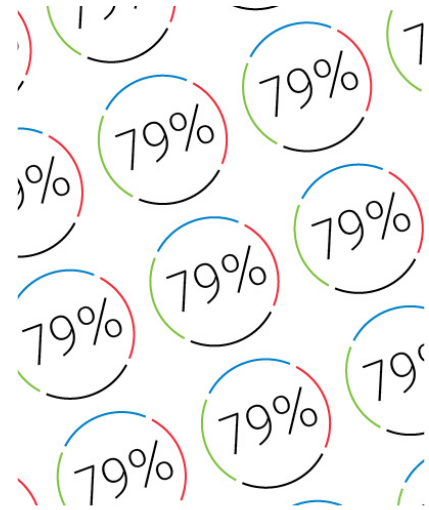
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