

"Coty" & Bird & Bird
a German perspective

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"Amer Sports" and "Scout I" - 2009

- OLG Munich, 02.07.2009, "Amer Sports"
 - Auction platform ban
 - No selective distribution system
 - VBER applies, Art. 4 lit. b (-)
no circumscribable customer group
- OLG Karlsruhe, 25.11.2009, "Scout I"
 - Auction platform ban
 - Selective distribution system
 - Qualitative criteria fulfilled, Art. 101 para 1 (-)
no luxury products but high quality branded products, heavily advertized
 - Presentation of branded goods is key qualitative criterium

"Scout II" - 2013

- KG, 19.09.2013 "Scout II"
 - Auction platform ban
 - Selective distribution system
 - High-quality branded products
 - Increase of competitiveness inter-brand *vs.* negative impact on intra-brand competition
 - Questionable: Is the "image" an element of the product?
 - In any case: Signaling of an above average level of quality
 - Ebay linked to "negative image" (irrespective if rightly so or not)
 - Design of an ebay-shop doesn't help
 - (However, criteria not uniformly applied ...)

"Casio" - 2014

- OLG Schleswig-Holstein, 05.06.2014 "Casio"
 - Auction platform and marketplace ban
 - No selective distribution system
 - No individual exemption
 - VBER does not apply, Art. 4 lit. b (+)
 - no "group identity" necessary
 - limitation of customers is sufficient

"Deuter" – 2015

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- OLG Frankfurt, 22.12.2015 "Deuter"
 - **Marketplace ban**
 - Selective distribution system
 - High-quality branded products, customer service needed
 - "Pierre Fabre" total internet ban; no fundamental change re. selective distribution
 - Not beyond what is necessary
 - Questionable: Is the "image" an element of the product?
 - In any case: Signaling of an above average level of quality
 - competent customer service not possible via Amazon
 - Amazon reseller shops don't help: individual design "superimposed" by Amazon Logo and respective links

"Deuter" – 2015

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- OLG Frankfurt, 22.12.2015 "Deuter"
 - (...)
 - Ban on **price comparison** websites
 - No direct sale activity
 - No significant negative impact on product image
 - BER not applicable due to market share

- German Federal Cartel Office, 26.8.2015 "Asics"
 - Ban on ...
 - ... Google Adwords
 - ... supporting price comparison websites
 - ... marketplaces
 - In final decision, assessment of marketplace ban "downgraded" to **obiter dictum**
 - Subsequent appeals proceedings do not address marketplace ban, OLG Düsseldorf, 5.4.2017 "Asics"
 - Appeal proceedings to Federal Supreme Court not granted
 - complaint insofar is pending

- Legitimate qualitative criteria *vs.* criteria resulting in de-facto ban of online distribution
- Sedes materiae
 - Art. 101 para 1 ?
 - Art. 4 lit. c VBER ?
 - Art. 101 para 3 ?
- FCO: Art. 4 lit. c VBER, "substantial" (*wesentliche*) limitation to sell online
 - marketplaces ensure visibility
 - marketplaces guarantee "feeling of being safe"
 - equivalent test to brick&mortar is non-functional
 - per se ban not linked to qualitative criteria
 - at the interface to a hard core, "obvious" qualitative elements required

What about non-luxury products?

- Distinction to "Pierre Fabre" could speak for more restrictive approach
 - Distinction (also) by reference to goods involved
 - Goods in Pierre Fabre "*were not luxury goods but cosmetic and body hygiene goods*" (Coty, para 32)
- Specific "Coty"- criteria re. Art. 101 (1) speak for similar approach

"Coty" and beyond

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- Appropriateness ...
 - goods exclusively associated with authorised distributors
 - no contractual link to marketplace
 - avoiding a sales channel "*for goods of all kinds*" contributes to luxury image
 - Not going beyond what is necessary ...
 - own websites are main distribution channel
 - pre-defined quality conditions are not as effective
- ➡ sales environment with "*goods of all kinds*" will generally have comparable negative impact on quality branded goods.

"Coty" and beyond

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- *"It is only if ... restricts competition within the meaning of Article 101 (1) TFEU that the question ... of Art. 101 (3) TFEU may arise."* (Coty, para 59)
 - Art. 4 lit. b VBER
 - No customer group
 - Art. 4 lit. c VBER
 - a market place ban does not prohibit internet sales
 - Google Adwords and access to search engines ensure visibility
- ➡ block-exempted where sales on marketplaces have only limited negative impact on product image (limitation inappropriate)

Thank you & Bird & Bird

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