



MEMORANDUM

Subject: Comments preliminary report Sector E-commerce sector inquiry
From: ASICS Europe BV, Hoofddorp, The Netherlands
To: European Commission
Date: 18 November, 2016

BACKGROUND/INTRODUCTION

First and foremost, the E-commerce Sector Inquiry is of very significant importance for ASICS Europe BV ('ASICS'), as well as for brand manufacturers in many industries or product categories which elect to distribute their products through selective distribution systems. ASICS' comments below will therefore concentrate on the potential repercussions of the E-commerce sector inquiry on selective distribution systems.

Over time, the ASICS brand has developed into a premium brand in the sporting goods industry on the basis of significant investments into product quality and innovation. Unsatisfactory customer service and advice could have a major negative impact on ASICS' brand image and very adversely affect its ability to serve its customers and compete with other brands. It is for this reason that, in April 2011, ASICS introduced an EEA-wide selective distribution system. By so doing, ASICS aimed at better meeting consumers' expectations in terms of brand presentation and services, irrespective of the territory or environment (offline or online) where its products were sold. In devising its selective distribution system, ASICS ensured that it was in line with EU competition rules and case-law.

In an increasingly omni-channel-driven world, selective distribution is all about brand manufacturers, in close cooperation with their retailers, creating, strengthening and safeguarding the trust between the brand and the consumer. Increasingly, brands use all available channels to provide consumers the brand-related experience, in terms of both product purchase and services (e.g. through practices such as click and collect, designing and ordering products online, signing up for activities at a retailer's premises or website, etc.) that they expect and value. Accordingly, in a rapidly changing and increasingly digital market environment, selective distribution meets an increasingly important business need.

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In this paper ASICS will focus on the following topics:

- I. Representativeness of the Sector Inquiry
- II. Legal qualification of provisions regarding online sales
- III. What if selective distribution cannot be used effectively online?
- IV. Harm to competition?
- V. The correct approach

Annexes:

Annex 1. Observations on the representativeness of the Preliminary Report on the E-commerce Sector Inquiry

Annex 2. The Sector Inquiry's preliminary findings on price comparison tools/use of trademarks

Annex 3. [REDACTED]

Annex 4. [REDACTED]

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I. Representativeness of the Sector Inquiry

ASICS would like to start with some general observations on the data collection method used by the European Commission (EC) for the E-commerce Sector Inquiry ('SI') and the way the data and results are presented.

The main source of information for the SI, and therefore also the basis for the preliminary conclusions in the preliminary report ('PR'), is the responses to the questionnaires. As the EC states (paragraph 22), the data should be read as summaries of the qualitative data obtained from the responses and are not intended to be read as statistical relevant figures 'in the strict sense'. However, throughout the PR this statement is not repeated and the way in which the results are presented could give the impression to the contrary, i.e. that the conclusions are, in fact, based on quantitative (statistical) data. ASICS trusts that this will be made clear in future communications and that, more importantly; this fact is taken into account when formulating policy initiatives.

ASICS considers that the Interim Report may in some respects give a balanced overview of the current general state of play within e-commerce. Nonetheless, ASICS believes that the EC may be faced with challenges on several aspects of its SI and the representativeness of the responses. ASICS deems it necessary as an interested and potentially impacted party, to flag in this paper those elements which are particularly relevant to assess the correct state of play in e-commerce for a company like ASICS operating in the sporting goods industry. This is particularly relevant in light of possible future policy making (**Annex 1. Observations on the representativeness of the Preliminary Report on the E-commerce Sector Inquiry**).

Only a more representative and robust study should be considered as a true starting point for general guidance, policy, enforcement priorities and investigation decisions. In addition, the SI would be much helped by a competition economist perspective taking into account the many different dynamics, economic efficiencies and a theory of harm analysis.

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II. Legal qualification of online sales provisions

The preliminary report attempts to provide a factual overview of certain provisions regarding online sales in the EU. However, as mentioned above, the overview cannot be considered to be representative and, as a consequence, is unable to provide a robust and substantive basis for future regulation, guidance or investigations.

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How should provisions (or even restrictions) on online sales and marketing in vertical agreements be qualified from a competition law perspective?

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III. What if selective distribution cannot be used effectively online?

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IV. Harm to competition?

It is widely accepted that, if there is sufficient *interbrand* competition on a relevant market, there is no need to interfere for competition authorities or regulators in vertical relationships between brand-manufacturers and retailers. Interbrand competition even increases in an omni-channel environment, which should relax any possible intrabrand competition concerns. In general, also sufficient interbrand competition exists for consumer products as was also explicitly acknowledged in the PR.

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Absent market power, there is no need for the EC (and national competition authorities) to interfere in vertical agreements and their provisions, when these only concern *intrabrand* competition. These agreements are even likely to increase *interbrand* competition. The current market situation and the existence of fierce interbrand competition for consumer goods both online and offline do not need or justify a stricter regulatory approach, not even on a case by case basis. Importantly, the SI does not show any real concerns from a purely competition law perspective.

One could even argue that a total ban of online sales does not amount to restriction by object, in case there is sufficient interbrand competition. In any case, all online provisions regarding the “how” of online sales, i.e. the modality of online sales, as opposed to the “if”, i.e. the prohibition of those sales should be exempted or subject to a case by case/proper effect analysis to be able to find them restricting competition.

Divergent approaches between member states and the lack of proper guidance have as a result that the situation gets ‘frozen’ and no one dares to ‘move’ any more. The brand manufacturer may have to decide to follow either the strictest regulatory approach or create different commercial strategies across Europe. The latter will be to the detriment of one digital single market, harmful for the economy and ultimately the end consumers.

V. The correct approach

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It is imperative that only restrictions where actual harm to competition is self-evident will be considered restrictions by object, which is in line with case law from the European Court of Justice ('ECJ'), for example in its recent judgment in *Cartes Bancaires*. If not, the freedom of brand-manufacturers to choose what they consider to be the optimal route to market their products and to preserve the consumer's personal experience of and satisfaction with the products and to ensure/manage the brand experience – be it online or offline – is at stake.

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In conclusion, the current legal framework and its interpretation by the ECJ should – if applied correctly – be providing sufficient guidance and confirm the conclusion that provisions relating to the 'how' of online sales as such cannot be considered being restrictions 'by object'. This type of provisions should be generally exempted if the market share of the brand-manufacturer is below a certain threshold (for instance 30%). Above the threshold there could be room for a case-by-case analysis into the actual effects and if the provisions/restrictions amount to a de-facto total ban of online sales. It is within the responsibility of the EC to provide clear and EU-wide clarity for both brand-manufacturers and national authorities accordingly.

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Annex 1.

Observations on the representativeness of the Preliminary Report on the E-commerce Sector Inquiry

Selection of addresses: retailers (5.1. paragraphs 39 - 42)

1. Absent a single data source big companies for the E-commerce Sector Inquiry ('SI') were selected from different existing databases and small companies from professional associations. Using different selection bases may create inconsistency in responses across member states.
2. As explained in paragraph 41 a minimum of 20 addressees has been used per member state. This to achieve a broad geographic coverage. However, this cannot be considered a robust basis and the results can only be considered as providing some qualitative insights. Furthermore, the total amount of respondents in 17 of the 28 member states is in fact well below 20 (see table 1A paragraph 48). Finally, the report does not specify per member state what type/company size/products the respondents in fact belong to. This is only reported on an aggregated level including all responses. Because of the consistent use of aggregated data the possible differences between the different product categories (markets) are not reflected in the response.
3. Paragraph 41 indicates that weight per member state is based on the approximated distribution of companies selling online. It is not clear what this means and for the evaluation of the results overall it would be necessary to know how the actual weight was calculated and what the impact of this weight was. This is not clear from the information provided in the Preliminary Report ('PR').
4. Companies with less than 10 employees were not included in the SI. The reasons to do so are not clear. In addition, by doing so the opinion of a very large and significant group of retailers is completely left out. By way of example, for sporting goods brand manufacturers these smaller retailers represent a significant part of their retailer base and their input can be relevant to get to a more comprehensive state of play analysis.
5. Also retailers which are only selling in offline stores are not included in the SI. The reason for this may seem plausible (as these retailers do not sell online), but this is not correct. [REDACTED]
[REDACTED]
[REDACTED] The considerations of this particular group of retailers to not sell online may however be very relevant to assess the state of play in the e-commerce market and as a result the importance of online sales and potential restrictions thereof may potentially be over-estimated.

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6. In paragraph. 42 the retailer response rate is mentioned. Apparently, the response rate differs per member state and per type of sector/organization differs. The PR however does not mention how this was compensated for. Even if a good distribution of addressees took place, if certain type of companies/sectors chose not to give input, the actual responses will not provide a correct overview of the market. The results of the research were skewed because of this self-selection process as well as the fact that also spontaneous requests for participation were granted.

Responses received (5.4: paragraphs 46 - 49)

7. Retailers were asked to fill in the questionnaire for all their websites. This likely resulted in companies providing the same response (for all their websites) multiple times. Hence the answers over-represent the larger companies/retailers and should have been corrected in that respect. The PR does not indicate how this has been dealt with.
8. Table A. 1 (paragraph 48) shows that the number of respondents per member state differs strongly and does not seem to be aligned with the actual market size. For example, the amount of respondents in Germany is 7 times bigger than France. This certainly does not reflect the actual situation of the state of play in e-commerce in the EU for the sporting goods industry. [REDACTED]

[REDACTED]

The apparent over-representation of Germany is particularly worrying as this may fuel the belief that “Germany is special” and increases the likelihood that possible policy initiatives will be based on perceived German-specific requirements and will not be consistent throughout the EU.

Characteristics of respondents: Retailers (1.1. paragraphs 65 - 72)

9. Figure B.2 (paragraph 68) reports on the distribution of respondents across product categories. The PR does not compare this with the actual situation. Furthermore, in the remainder of the PR the results, figures and findings cannot be traced back to the different product categories, retailer types or countries. All kinds of consumer products from eBooks to running shoes are thereby put in one basket, without looking at the different characteristics of the products. These different product characteristics are however also very relevant for the e-commerce market. For instance, eBooks can only be purchased online, do not need to be delivered and cannot be returned. This is obviously completely different for sports footwear. Thus, responses from retailers selling a certain product category may be entirely irrelevant for another product category. This in combination with the small amount and sample of responses make that the data may not be considered as representative.

10. Figure B.3 (paragraph 70) shows that only 1% of all respondents only sell offline. As explained above this does not reflect the actual retail landscape. [REDACTED]

[REDACTED]