

The ECJ Advocate General wants to make sales bans for selective distribution and luxury goods in eCommerce legal according to antitrust law

Nils Wahl: Luxury brands are to be able to prohibit trading on marketplaces

Berlin, 27.07.2017 – Manufacturers and brands can be allowed to restrict competition through a selective distribution system based on their luxury image. **Nils Wahl**, General Prosecutor at the European Court of Justice (ECJ), reported yesterday in his [Opinion](#). In giving his preliminary Opinion, as is customary in ECJ proceedings, Wahl was referring to the current case of C-230/16 Coty Germany/Parfümerie Akzente. The ECJ has to clarify in this case whether the “luxury image” of a product can justify a selective distribution system and whether manufacturers can ban the sale of their goods via online marketplaces such as Amazon. Advocate General Wahl is of the opinion that manufacturers and brands may be allowed to restrict competition through a selective distribution system on the basis of a luxury image alone. As a result, a sweeping ban on the sale of luxury goods such as perfumery products on online marketplaces is permissible under certain conditions according to antitrust law. The Advocate General has left the situation for mass-market products open. Final clarity about the ECJ ruling is not expected for about six months.

This is the fatal blow for small European retailers – BVOH warns against monopolistic trade culture

“ECJ Advocate General Wahl’s statements are a blow for fair free trade and are effectively a death sentence for many thousands of small and medium-sized retailers in Europe. If the ECJ were to follow the Advocate General’s path, we will soon have an even worse situation in eCommerce than we already suffer in bricks and mortar retail. We at the BVOH predict that this will produce a consumer-unfriendly monopolistic trade culture dominated by manufacturers and a few individual giants. Diversity and competition will then be dead,” says **Oliver Prothmann**, President of the Bundesverband Onlinehandel ([BVOH](#)) eCommerce association.

The history of the decisions – legal disputes surrounding Coty have been ongoing since 2014

The [perfume manufacturer Coty](#) had taken action against one of its retailers, the [perfume chain Akzente](#), as they are selling Coty products on Amazon Marketplace despite a restrictive contractual agreement. Almost exactly three years ago, the District Court in Frankfurt am Main ruled on 31 July 2014 (AZ: 2-3 O 128/13) in the first instance. The court found that the clause included in Coty’s distribution agreements, which prohibits all Internet sales via third-party platforms, such as Amazon, is a core restriction under Article 4 lit. (C) of the block exemption regulation for vertical agreements (VABE) and is therefore not exempt from them. Furthermore, the court failed to identify any criteria which may prohibit the sale on Amazon of Coty perfumes and cosmetics. Coty launched an appeal to the Higher Regional Court in Frankfurt am Main (11 U 96/14 (Kart)) against this decision on 19 April 2016 and presented various questions to the ECJ on the admissibility of market bans.

Trademark manufacturers must lay out transparent criteria for eCommerce

The manufacturer must instigate a selective distribution system to effectively impose a prohibition on sales. These selective distribution systems are to regulate the distribution of luxury and prestige goods, such as in Coty’s system. One of the prerequisites for such a distribution system is a qualitative requirement for the presentation of luxury goods on the Internet. Advocate General Wahl does not see third-party platforms such as online marketplaces as being able to guarantee these standards. “I am not aware of any qualitative requirements in a selective distribution system that can be implemented in an online shop, but in an online marketplace such as eBay or Rakuten this is not the case. In Germany, 50% of the online market is already generated through marketplaces. This means that the consumer loves shopping through marketplaces. The Advocate General’s ruling ignores developments in the trade and protects the manufacturers and brands. The consumer and SME retailers lose out,” says **Oliver Prothmann**.

Restrictions in eCommerce threaten existences

Restrictions in eCommerce are by no means a trivial offence. In Germany alone, they are the cause of [losses](#) of more than 20% per annum among retailers. In other European countries, the ratio is even higher: Great Britain 25%, France 26% and Italy 29%. The US sports article manufacturer Nike [leads the way](#) in all the surveys on sales restrictions. "The National Cartel Office has been examining Nike's pertinent competition violations for years, but they have never been dealt with since they were too busy with the proceedings against Adidas and Asics. It cannot continue like this. The behaviour of manufacturers such as Coty or Nike is threatening the existence of eCommerce. We are calling on the ECJ and policy-makers to finally protect the existences of the small traders better and to put a stop to the machinations of manufacturers," says **Oliver Prothmann**.

EU Commissioner Margrethe Vestager opens proceedings against Nike

Alongside the ECJ proceedings, the EU Commissioner for competition, Margrethe Vestager, has now started an official [case](#) against Nike. Time is pressing. Because Nike is not only the most frequently cited in recent trade surveys, such as last year's [BVOH survey of more than 7000 retailers](#), but the sporting goods manufacturer is also pushing ahead with monopolisation.

Nike has already announced a closer cooperation with the online marketplace Amazon in the USA. In the future, it would be virtually impossible to allow any more merchants to sell Nike products on this online marketplace. "Amazon and Nike are destroying the entire sports retail trade with this. Because it will have serious economic consequences if a retailer is no longer allowed to offer such an important brand as Nike. And as a consequence, the consumer too will find that there is no longer any real competition," says **Oliver Prothmann**.

BVOH: market-dominating companies such as Amazon and Nike have to be regulated

BVOH is making a clarion call for stronger policy intervention, as this cooperation between Nike and Amazon is only the tip of the iceberg and just one example of a development in the trade which will ultimately affect all brands.

A development whose negative consequences will affect retailers and consumers alike in the long run. The BVOH calls for politicians in Brussels and all other capitals to stop monopolising trade. Politicians must ensure that the same concentration of brands and chains does not occur in eCommerce as it does in the central shopping streets of European cities. "If politicians want variety in trade, then market-dominating companies such as Amazon and Nike must be regulated," says **Oliver Prothmann**.

A detailed commentary by Oliver Prothmann, President of the eCommerce association Bundesverband Onlinehandel, can be found here: <http://www.choice-in-ecommerce.org/fatal-blow-looms-amazon-and-nike-threaten-ecommerce/>.

About the BVOH

The eCommerce association Bundesverband Onlinehandel (BVOH) has been representing the interests of business owners, as well as consumers within the online business community since 2006.

The BVOH is the face and voice of reputable online retailers and has set itself the task of bringing together online retailers, politicians, online marketplaces, suppliers and equipment suppliers. On 31 August 2017, the "Day of eCommerce" will be held in Berlin (www.tdoh17.de / #tdoh17).

About Choice in eCommerce

Choice in eCommerce is an eCommerce sellers' initiative founded by Oliver Prothmann in May 2013. Over the last two years, Mr Prothmann and many members of the seller community have become increasingly concerned by the negative impact of platform bans, especially on small and medium-sized sellers. As a marketplace expert, he discussed with merchants how to act against any kind of discrimination against eCommerce in order to preserve innovation and growth in the sector.



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First Choice in eCommerce run a petition signed by nearby 15,000 European retailers handed over to EU Commissioner Olli Rehn in December 2013. In the next years Choice in eCommerce publish several survey about online restrictions. The pressure the initiative put to EU Commission and EU Parliament were one of the reasons why EU Commision started a sector inquiry e-commerce with the main topic of sales restrictions.

All results and information can be found on www.choice-in-ecommerce.org or on [Facebook](#)

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